Rohana bte Ariffin & Anor v Universiti Sains Malaysia

HIGH COURT (PENANG) – ORIGINATING MOTION 32-17-86
EDGAR JOSEPH JR J
20 JANUARY 1989

Administrative Law – Application for certiorari to quash decisions of university council dismissing appeals from disciplinary authority of university – Principles for review of decisions of public authorities and inferior tribunals – Presence of registrar, the complainant, during the deliberations of the disciplinary authority – Refusal of application for pre-trial discovery of documents – Procedural unfairness at hearing – Duty to give reasons – Penalty imposed ultra vires the Rules – Universiti Sains Malaysia (Discipline of Staff) Rules 1979, rr 4, 14, 27, 33 & 35 – Universities and University Colleges Act 1971, s 16A

University – Disciplinary action against lecturers – Appeal against decision of disciplinary authority dismissed – Application for certiorari to quash decision of university council dismissing the appeals – Presence of registrar, the complainant, during the deliberations of the disciplinary authority – Refusal of application for pre-trial discovery of documents – Procedural unfairness at hearing – Duty to give reasons – Penalty imposed ultra vires the Rules – Universiti Sains Malaysia (Discipline of Staff) Rules 1979, rr 4, 14, 27, 33 & 35 – Universities and University Colleges Act 1971, s 16A

In this case the applicants, lecturers in the respondent university, applied for orders of certiorari to quash the decisions of the council of the respondent university dismissing their appeals from decisions of the relevant disciplinary authority.

The first applicant had been charged with the offence of making a public statement on policies and decisions of the respondent university in relation to a matter when such statement would be detrimental to such policies of the university in contravention of rr 4 and 18 of the Universiti Sains Malaysia (Discipline of Staff) Rules 1979. She was found guilty by the disciplinary authority. The second applicant had been found guilty of (a) a charge of making a public statement on a matter that would be detrimental to the policies and decisions of the respondent university in contravention of rr 4 and 18 of the said Rules, (b) a charge alleging conduct which was irresponsible, an offence under r 4(2) of the Rules, and (c) two charges of inciting students on separate occasions to boycott activities organized by the student affairs department of the university. The university council in confirming the finding of guilt recorded by the disciplinary authoriy against the first applicant allowed her appeal against sentence by substituting for the punishment of a warning and a reduction of salary of two salary increments to last for one year from 1 February 1986, a warning and a reduction of salary by one increment for a period of one year from 21 February 1986 to 20 February 1987.

In the case of the second applicant, the university council, whilst confirming the findings of guilt recorded by the disciplinary committee against him, allowed his appeal against sentence by substituting in place of the punishment of dismissal, the sentence of a warning and a reduction of salary increment to last from 21 February 1986 to 20 February 1991.

Held: allowing the application:

(1) The proceedings before the disciplinary authority were contrary to natural justice owing to the presence of the registrar of the respondent university, the complainant in the case of both the applicants, during the disciplinary authority's deliberations. In this case the registrar was very far from being a mere nominal complainant and had shown active partisanship in the proceedings before the disciplinary authority.

(2) It is a well-established principle of administrative law that anything that restricts or appears to restrict the defendant's ability to present his case may be held to be a breach of procedural fairness and is thereby susceptible to judicial review. In this case the disciplinary authority had refused to accede to the requests of the applicants' solicitors and counsel for pre-trial discovery. This was tantamount to denying the applicants their right to make written representations. The right to be heard necessarily means the right to know the case against oneself.

(3) The copy of the record of proceedings before the disciplinary authority showed that over the objections of counsel for the applicants, members of the disciplinary committee persisted in telling the student witnesses before they testified what evidence was expected of them. This showed that justice was not being done and was a breach of the principle that justice should not only be done but should manifestly and undoubtedly be seen to be done.

(4) Having regard to all the circumstances in the present case, a reasoned decision can be an additional constituent of the concept of fairness. Neither the disciplinary authority nor the university council gave reasons for their decision and the applicants are entitled to succeed on this ground.

(5) The university council may in no circumstance enhance a punishment imposed by the disciplinary authority since such a power, which must be the creature of statute, is not given to the council. Neither the disciplinary authority nor the council were empowered to impose the punishment of reduction in salary in excess of the limitation imposed by r 35 of the Rules. The punishment of reduction of salary by five salary increments for five years imposed by the council on the second applicant had the effect of reducing him from salary grade A10 to grade A11 and was therefore ultra vires the Rules.

(6) In all the circumstances, certiorari must go in terms of both the applications.

Cases referred to

1 *Associated Provincial Picture Houses* v *Wednesbury Corporation* [1948] 1 KB 223; [1947] 2 All ER 680 (refd)
2 *Ridge* v *Baldwin* [1964] AC 40 (refd)
3 *Padfield* v *Minister of Agriculture, Fisheries & Food* [1968] AC 997 (refd)
4 *Anisminic* v *Foreign Compensation Commission* [1969] 2 AC 147 (refd)
5 *Secretary of State for Education & Science* v *Tameside BC* [1977] AC 1014 (refd)
6 *Chief Constable of the North Wales Police* v *Evans* [1982] 1 WLR 1155; (1982) 3 All ER 141 (refd)
7 *O'Reilly* v *Mackman* [1983] 2 AC 237 (refd)
8 *Law* v *National Greyhound Racing Club Ltd* [1983] 1 WLR 1302; [1983] 3 All ER 300 (refd)
9 *Square Meals Frozen Foods Ltd* v *Dunstable Corporation* [1974] 1 WLR 59; [1974] 1 All ER 441 (refd)
10 *R* v *Crown Court at Ipswich, ex p Baldwin* [1981] 1 All ER 596 (refd)
11 *Council of Civil Service Unions* v *Minister for the Civil Service* [1984] 3 WLR 1174; [1984] 3 All ER 935 (refd)
12 *Bugdaycay* v *Secretary of State for the Home Department* [1987] 1 All ER 940 (refd)
13 *Cooper* v *Wilson* [1937] 2 KB 309 (refd)

14 *Stollery* v *Greyhound Racing Control Board* (1972) 128 CLR 509 (refd)
15 *R* v *Barnsley Council, ex p Hook* [1976] 1 WLR 1052 (refd)
16 *R* v *Leyland Justices, ex p Hawthorn* [1979] QB 283 (refd)
17 *R* v *General Medical Council, ex p Gee* [1987] 1 All ER 1204 (refd)
18 *R* v *Architects' Registration Tribunal, ex p Jaggar* [1945] 2 All ER 131 (refd)
19 *Crompton* v *GMC* [1981] 1 WLR 1435 (refd)
20 *Crompton* v *GMC (No 2)* [1985] 1 WLR 885 (refd)
21 *BSS Kanda* v *Government of Federation of Malaya* [1962] MLJ 169 (refd)
22 *Wiseman* v *Borneman* [1971] AC 297 (distd)
23 *Paul Wallis Furnell* v *Whangarei High Schools Board* [1973] AC 660 (distd)
24 *Lewis* v *Heffer* [1978] 3 All ER 354 (distd)
25 *R* v *Weston-super-Mare Justice, ex p Taylor* [1981] Cr LR 179 (refd)
26 *R* v *Sussex Justices, ex p McCarthy* [1924] 1 KB 256 (refd)
27 *Siemens Engineering & Manufacturing Co* v *Union of India* AIR 1976 SC 1785 (refd)
28 *Breen* v *Amalgamated Engineering Union* [1971] 2 KB 175 (refd)
29 *Norlia bte Shukri* v *University of Malaya & Anor* [1983] 1 MLJ 100 (not folld)

Legislation referred to
Federal Constitution art 132
Public Officers (Conduct and Discipline) General Orders 1980 (Chapter D) r 26(7)
Universiti Sains Malaysia (Discipline of Staff) Rules 1979 rr 4, 14, 27, 33, 35
Universities and University Colleges Act 1971 s 16A

Tuan Haji Sulaiman bin Abdullah (E Sree Santhan and *Sivarasa Rasiah* with him) for the applicants.

Raja Abdul Aziz Addruse (*NG Sivanandan* with him) for the respondent.

Cur Adv Vult

Edgar Joseph Jr J: These applicants, Rohana bte Ariffin and Hashim Hussin Yaacob, both lecturers in Sociology and Development Studies at the Universities Sains, Malaysia, the respondent herein, have applied for orders of certiorari to remove into this court for the purpose of them being quashed two separate decisions of the council of the respondent university ('the council'), dated 10 March 1986, dismissing their appeals from decisions of the relevant disciplinary authority ('the disciplinary authority').

In the case of the applicant Hashim, he had been found guilty by the disciplinary authority of four of the six offences charged, namely:

(a) a first charge of making a public statement on a matter that would be detrimental to the policies and decisions of the respondent university in relation thereto and thereby committed an offence under r 18(1) of the Universiti Sains Malaysia (Discipline of Staff) Rules 1979 (hereinafter referred to as 'the said Rules') and acted so as to bring discredit to the reputation of the respondent university, and thereby committed an offence under r 4(2)(d) of the said Rules;
(b) a second charge alleging conduct which was irresponsible, an offence under r 4(2) of the said Rules;
(c) two charges of, inter alia, inciting students, on separate occasions, to boycott activities organized by the student affairs department of the respondent university which were offences under r 4(2)(g) and 4(2)(j) of the said Rules.

The council, whilst confirming the findings of guilt recorded by the disciplinary authority against him on the charges aforesaid, allowed his appeal against sentence by substituting, in place of the punishment of dismissal, the sentence of a warning and reduction of salary by five salary increments to last from 21 February 1986 to 20 February 1991.

In the case of the applicant Rohana, she had been found guilty by the disciplinary authority of an offence of making a public statement of the policies and decisions of the respondent university in relation to a matter when such statement would be detrimental to such policies of the respondent university in contravention of r 18(1) and had thereby also acted irresponsibly in contravention of r 4(2)(g) of the said Rules.

The council whilst confirming the finding of guilt recorded by the disciplinary authority against the applicant Rohana on the charge aforesaid allowed her appeal against sentence by substituting, in place of the punishment of a warning and a reduction of salary by two salary increments to last for one year from 1 February 1986, a warning and a reduction of salary by one increment for a period of one year from 21 February1986 to 20 February 1987.

Before me, the decisions of the council had been impugned on a number of grounds but having regard to the conclusions at which I have arrived regarding some of these it is unnecessary for me to deal with the rest.

I would at the outset say that in considering these applications I have kept in the forefront of my mind the basic principles to be distilled from a number of cases upon which courts will review decisions of public authorities and inferior tribunals.

The basic principles may be stated thus:

(1) judicial review applies to any body of persons having legal authority derived from public law to determine questions affecting the rights of subjects whether that right is derived from statute or from the common law:
(2) the High Court is not a Court of Appeal from the body under review;

(3) the High Court limits itself to determining whether the public authority or inferior tribunal has acted lawfully, rationally and with due regard to proper procedures;
(4) the court will not substitute its judgment or discretion for the judgment or discretion of the body under review;
(5) facts determined by the body under review are rarely open to review in the High Court;
(6) the High Court will intervene unless there is express statutory direction to the contrary;
(7) if there is an established appeal procedure from the decision of the body under review the court usually prefers this course to be followed;
(8) only activities of a public nature can be the subject of judicial review.

The cases from which I have distilled the above principles are: *Associated Provincial Picture Houses* v *Wednesbury Corporation*,[1] *Ridge* v *Baldwin*,[2] *Padfield* v *Minister of Agriculture, Fisheries & Food*,[3] *Anisminic* v *Foreign Compensation Commission*,[4] *Secretary of State for Education & Science* v *Tameside BC*,[5] *Chief Constable of the North Wales Police* v *Evans*,[6] *O'Reilly* v *Mackman*,[7] *Law* v *National Greyhound Racing Club Ltd*,[8] *Square Meals Frozen Foods Ltd* v *Dunstable Corporation*,[9] *R* v *Crown Court at Ipswich, ex p Baldwin*[10] and *Council of Civil Service Unions* v *Minister for the Civil Service*.[11]

I would, however, in passing, and as a matter of general interest, remark that there are dicta in administrative law cases in the UK which indicate that judges there are beginning to depart from their traditional preference of dealing with the technicalities of remedies rather than the principles governing official action and individual rights. For example,in a recent immigration case *Bugdaycay* v *Secretary of State for the Home Department*,[12] in the House of Lords, Lord Bridge stated that courts are entitled within limits:

> to submit an administrative decision to a more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.

And Lord Templeman said this:

> Where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process.

I must now turn to consider the particular circumstances of the present case.

The presence of Mr Ogle, the complainant, during the disciplinary authority's deliberations

It was argued that the proceedings before the disciplinary authority were contrary to natural justice owing to the presence of Mr NA Ogle, the registrar of the respondent university, the secretary of the disciplinary authority, the secretary of the university council and the complainant in the case of both the applicants, during the disciplinary authority's deliberations.

For a better appreciation of this point, it would, I think, be useful if I reproduced the reports made by Mr Ogle dated 17 September 1985, to the vice chancellor, which set the machinery of the disciplinary proceedings in motion against the applicants.

The report made by Mr Ogle against the applicant Hashim was in the following terms:

> 1 I, as secretary of the disciplinary committee, Universiti Sains Malaysia, wish to report officially that a staff member of Universiti Sains Malaysia, namely, Mr Hashim Hussin bin Yaacob, who works as a lecturer at the School of Social Sciences, has made public statements in the newspapers, *The Star* (25 August 1985) and *The New Straits Times* (26 August and 17 September 1985). The public statements referred to are attached together with this report as lampiran A. In those public statements, Mr Hashim Hussin bin Yaacob has made various allegations against the administration of the university, quality of education, aspects of service mainly promotion and the appointment of dean. His behaviour as such may be construed as contravening r 18(1) of the Universiti Sains Malaysia (Discipline of Staff) Rules 1979 which reads as follows:
>
> 'A staff member shall not, either orally or in writing or in any other manner, make any public statement on the policies or decisions of the university in relation to any matter, or circulate any such statement whether made by him or any other person:
> Provided that this rule shall not apply to any public statement made by a staff member with the prior approval of the vice chancellor in connection with the performance of the duties of his office.'
>
> 2 The public statements referred to above are detrimental to the policies and decisions of the university and overall, have caused odium to the university. Therefore for these reasons, Mr Hashim Hussin bin Yaacob can be said to have conducted himself so as to bring the university into disrepute or to bring discredit thereto which is an offence under r 4(2)(d) and also 'be irresponsible', an offence under r 4(2)(g) of the Universiti Sains Malaysia (Discipline of Staff) Rules 1979.
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> 3 Due to the conduct of Mr Hashim Hussin bin Yaacob as reported above, it is recommended to the Honourable Datuk to forward this matter for the consideration of the disciplinary committee of Universiti Sains Malaysia so that appropriate action may be brought against him.

The report made by Mr Ogle against the applicant Rohana was in the following terms:

1 I, as secretary of the disciplinary committee, Universiti Sains Malaysia, wish to report officially that a staff member of Universiti Sains Malaysia, namely, Mrs Rohana bte Ariffin, who works as a lecturer at the School of Social Sciences, has made a public statement in the newspaper, *The Star*, on 27 August 1985. The public statement referred to is attached together with this report as lampiran A. In that public statement, Mrs Rohana bte Ariffin has expressed support for the public statements made by Mr Hashim Hussin bin Yaacob prior to this date. As reported to the Honourable Datuk, the public statements made by Mr Hashim Hussin bin Yaacob prior to 27 August 1985 may be construed as violating r 18(1) of the Universiti Sains Malaysia (Discipline of Staff) Rules 1979. As such, the support expressed by Mrs Rohana bte Ariffin through her public statement towards the public statements made by Mr Hashim Hussin bin Yaacob prior to that may also be construed as contravening r 18(1) of the Universiti Sains Malaysia (Discipline of Staff) Rules 1979 which reads as follows:

'A staff member shall not, either orally or in writing or in any other manner, make any public statement on the policies or decisions of the university in relation to any matter, or circulate any such statement whether made by him or any other person:
Provided that this rule shall not apply to any public statement made by a staff member with the prior approval of the vice chancellor in connection with the performance of the duties of his office.'

2 The public statement referred to above is detrimental to the policies and decisions of the university and overall has caused odium to the university. Therefore for these reasons, Mrs Rohana bte Ariffin can be said to have conducted herself so as to bring the university into disrepute or to bring discredit thereto which is an offence under r 4(2)(d) and also 'be irresponsible', an offence under r 4(2)(d) of the Universiti Sains Malaysia (Discipline of Staff) Rules 1979.

3 Due to the conduct of Mrs Rohana bte Ariffin as reported above, it is recommended to the Honourable Datuk to forward this matter for the consideration of the disciplinary committee of Universiti Sains Malaysia so that appropriate action may be brought against her.

Mr Ogle had also affirmed an affidavit in opposition dated 29 July 1987, on behalf of the respondent university wherein appear substantial particulars of the grounds why it was said the applicants should be denied the reliefs prayed for.

Most particularly, after having deposed by way of introduction that he was duly authorized by the respondent university to affirm the affidavit on its behalf and that he had personal knowledge of the matters deposed therein, he referred to the grounds upon which the applicants had attacked the decision of the disciplinary authority; these grounds were as follows:

(a) that there was bias or a real likelihood of bias on the part even of the new disciplinary authority by reason of its chairman being the deputy vice chancellor of the respondent university, in that he would or was likely to be influenced against the applicants, considering the nature of the charges preferred against the applicants;

(b) that the disciplinary authority showed its bias when it refused to furnish to the applicants, in advance of the hearing, necessary documents and information;

(c) that the disciplinary authority failed to observe the rules of natural justice and fairness by its refusal to provide to the applicants copies of documents which it had considered, thereby depriving the applicants of the full and proper exercise of the right to a hearing;

(d) that the applicants in not being informed by the disciplinary authority as to how the statement made had adversely affected the policies and decisions of the respondent, had also been deprived of the full and proper exercise of their rights to a hearing;

(e) that the disciplinary authority had failed to give proper, or any grounds or reasons for its decision; and

(f) that the disciplinary authority acted in excess of jurisdiction by its failure to consider that the second applicant made the statement not in his capacity as a staff member of the respondent, but in his capacity as president of Persatuan Kakitangan Akademik dan Pentadbiran, USM ('PKAPUSM').

Other grounds referred to by Mr Ogle upon which it was alleged by the applicants that the disciplinary authority had erred in law, were as follows:

(a) it failed to appreciate that the making of the statement by the second applicant was justified by reason of necessity;

(b) it failed to consider that the said statement concerned the respondent university as a social institution which was within the field of study of the second applicant, who was, in any event, expressing himself on an academic matter at a workshop organized by PKAPUSM; and

(c) it wrongly construed the second applicant's conduct as 'irresponsible' when he was carrying out his duty as an office-bearer of a registered society and as a sociologist.

In reply, Mr Ogle said this in his affidavit:

6 Arising out of the applicants' objection to the vice chancellor being one of the members of the disciplinary authority, the vice chancellor deliberately took leave in order that one of the two deputy vice chancellors (who then became acting vice chancellor) could be appointed to replace the vice chancellor as member of the disciplinary authority, in compliance with the provisions of s 16(a) of the Universities and University Colleges Act 1971.

7 There is no substance in the applicants' allegation of bias. It is evident from the applicants' said affidavits that the disciplinary authority was reconstituted as a result of, and in deference to, the objection taken by the applicants to the vice chancellor being one of its members.

8 The applicants seek to show the disciplinary authority's bias by reference to its refusal to furnish the copies of

documents and reports, and the further particulars, mentioned in para 53 of the said affidavits. I verily believe that the charges framed against the applicants clearly spell out the case which they had to meet, and such refusal could not have had, and did not have the effect stated in para 54 of the said affidavits.

9 The applicants also seek to show such bias by alleging that the disciplinary authority did not treat their witnesses in the same way the authority did with the student witnesses. I verily believe that the disciplinary authority was quite entitled to deal with the student witnesses differently. Unlike the applicants, the disciplinary authority did not have the services of counsel to examine the student witnesses. It was, therefore, necessary that these witnesses be made aware of the charges being dealt with by the authority in order that they might confine themselves to relevant matters only when giving their evidence. After they were informed of the charges, the student witnesses were left to give whatever evidence they wished. No leading questions were directed at them by the disciplinary authority, and counsel for the applicants were permitted, and had every opportunity, to cross-examine them. At no time prior to their appearance at the hearing had the disciplinary authority heard the student witnesses, or informed them of the charges preferred against the applicants or made any attempt to tell them as to the evidence they should give at the hearing. The allegation that the disciplinary authority treated these witnesses differently because it was biased is unjustified.

10 As to para 57A and 57B of the said affidavits, the press clippings were given to the applicants at the hearing because they went to show that the statement made by the applicants had been detrimental to the well-being of the respondent.

11 Those clippings were in the possession of the officials servicing the disciplinary authority and they had written on them various comments and notations. These comments and notations were irrelevant to the proceedings and were obliterated when given to the applicants.

12 The applicants' allegation that the disciplinary authority had made up its mind against them and was merely going through the motion of conducting a hearing is totally untrue and is disproved by the very fact that the disciplinary authority took time to consider before it made its decision; and the fact that the disciplinary authority found against the applicants on only four of the six charges further shows the allegation to be unfounded.

13 The applicants' contention that the disciplinary authority had erred in law in finding against them in relation to the statements they made (when the same were made in their capacity not as staff members of the respondent but as the acting president and president of the PKA-PUSM respectively) is, I verily believe, untenable. As staff members of the respondent, the applicants had certain responsibilities and were subject to be disciplined if they breached the staff disciplinary regulations.

14 As for para 62 of the said affidavits, the question whether the second applicant had carried out the study mentioned as a formal research activity or as an informal project was asked of the second applicant merely to establish a fact. It is quite unfair of the second applicant to regard and to look upon everything done by the disciplinary authority as having been motivated by bias.

15 It is true that the disciplinary authority did not have any written grounds for its decision, but it came to its said decision after carefully considering the evidence before it. Copies of the notes of the proceedings and the English translations thereof relating to the first and second applicants are now produced and shown to me marked 'NAO 1', 'NAO 2', 'NAO 3' and 'NAO 4' respectively and copies of the same are annexed hereto.

Mr Ogle had also referred to the grounds upon which the applicants had attacked the decision of the council as follows:

(a) to have also committed the same errors in law as did the disciplinary authority, for the reasons stated in para 4 hereof;

(b) to have erred in law and, therefore acted in excess of jurisdiction, in not considering properly or at all the applicants' grounds of appeal; and

(c) to have acted without or in excess of jurisdiction in the punishment it imposed on the applicants.

In reply, Mr Ogle said this in his affidavit:

16 The applicants appealed against the decision of the disciplinary authority, and the appeal was considered by the university council which modified the decision in so far as it related to the punishment imposed. The issues raised in the said affidavits were also raised in the appeals and have been considered by the university council when it decided on the appeals.

And then, generally, Mr Ogle said this in his affidavit:

17 I verily believe that the applicants have not, by the said affidavits, shown any circumstance which warrants the removal to this honourable court of the decisions of the disciplinary authority and of the university council for the purpose of their being quashed.

18 I, therefore, respectfully pray that the applications of the applicants herein be dismissed with costs.

Clearly, having regard to the contents of Mr Ogle's reports and affidavit aforesaid, he had assessed the facts and was very far from being a mere nominal complainant. Indeed, I would go further and say that judging from his reports and his affidavit aforesaid, Mr Ogle had shown active partisanship in the proceedings before the disciplinary authority.

It was common ground that Mr Ogle was in fact present throughout the deliberations of the disciplinary authority and no reasons were vouchsafed to this court as to the necessity for his presence there. I accept that Mr Ogle did not discuss the case with members of the disciplinary authority nor did he take part in their deliberations. The fact remains, however, that he was present with the members of the disciplinary authority during their deliberations and decision.

In *Cooper* v *Wilson*,[13] Greer LJ said this:

I think the cases relied on by Mr Wooll, *R* v *Essex Justices* [1927] 2 KB 475, *R* v *London County Council* [1892] 1 QB

190 and *R* v *Brixton Income Tax Commissioners* (1913) 29 TLR 712 establish the proposition that if the conduct of the justices is such as to give rise to a reasonable suspicion that justice does not seem to have been done, then their decision should be set aside. It is noticeable that in all those cases it was established to the satisfaction of the court that the persons whose presence was complained of when the tribunal was considering its decision in fact took no part in the decision ... I ask myself what would anyone have thought who came into the room where the committee were sitting, after the plaintiff had gone out while those were considering their decision, and found sitting on the Bench with the committee one of the respondents to the appeal who had opened the case, though he had left the calling of the witnesses to Superintendent Hughes. Such a person, if reasonable, would have been likely to say to himself:

'There has been an opportunity here for one of the parties to influence the judgment of the committee, and it looks as if justice may seem not to have been done.'

And, in the same case, this is what Scott LJ said at p 344:

It makes no difference whether he then discussed the case with them or not; the risk that a respondent may influence a court is so abhorrent to English notions of justice that the possibility of it or even the appearance of such a possibility is sufficient to deprive a decision of all judicial force, and to render it a nullity.

In *Stollery* v *Greyhound Racing Control Board*,[14] the facts were these. The Greyhound Racing Board, a body incorporated by statute to control and regulate greyhound racing in New South Wales, made rules which empowered it to inquire into and deal with matters detrimental to the proper conduct of greyhound racing. A greyhound owner sent to the manager of an association which conducted greyhound racing who was also a member of the board an envelope containing forms nominating certain dogs for a race together with $200 in notes. At all material times a greater number of dogs were nominated for races than could be accepted, and the association determined which dogs should be permitted to race. The manager asked for an explanation for the inclusion of the money and was told that it was a gift in respect of the manager's recent marriage. The manager replied that the making of gifts to officials was the type of thing he was fighting against. He then reported the incident to the board. At an inquiry by the board the manager's report was read to the owner, who stated that he had no ulterior purpose in sending the money and that it was a gift to the manager for reasons unconnected with racing. The owner then withdrew. The board deliberated and resolved to charge the owner with conduct detrimental to the proper regulation and control of the sport. The owner was recalled, heard again, and withdrew. The board deliberated further and resolved that he be found guilty and be disqualified for twelve months. *The manager was present in the boardroom throughout the deliberations and decisions, but took no part in them.* (emphasis added)

It was held by the High Court of Australia (1) that the manager was in the position of an accuser in the proceedings and was disqualified from acting as a member of the board in relation thereto, (2) that notwithstanding that there was no dispute involving the overt acts, the manager's presence during the deliberations and decisions of the board was inconsistent with the principles of natural justice, even though he did not participate in the deliberations or decisions.

At p 519, Barwick CJ said, inter alia, this:

The basic tenet that justice should not only be done but be seen to be done does not, of course, warrant fanciful and extravagant assertions and demands. What justice requires will ever depend on circumstances, and the degree to which it should be manifest that it is being done will likewise be related to the particular situation under examination by a supervising tribunal. But, in my opinion, dissatisfaction engendered in the mind of an observer aware of the facts, by the continued presence of Mr Smith in his boardroom, having regard to his personal connection with the matter in hand, is not extravagant or far-fetched. As I have said, a reasonable man could very properly suspect that the clear opportunity which Mr Smith had for influencing the decision of the board might well have been used.

At p 520, Menzies J said, inter alia, this:

A long line of authority establishes that the decision of a tribunal, whose duty it is to act judicially, will be invalidated if, while the tribunal deliberates and reaches a finding adverse to a person whose conduct is under scrutiny, there is present some person who, in fairness, ought not to be there: *R* v *Sussex Justices, ex p McCarthy* [1924] 1 KB 256; *R* v *Essex Justices, ex p Perkins* [1927] 2 KB 475; *Cooper* v *Wilson* [1937] 2 KB 309; *R* v *Camborne Justices, ex p Pearce* [1955] 1 QB 41; *Ex parte Angliss Group* (1969) 122 CLR 546.

At pp 526 and 527, Gibbs J said, inter alia, this:

It is, however, clear that it would not be in accordance with the principles of natural justice for a person who was in truth the accuser to be present as a member of the tribunal when the charge which he had promoted was heard, even if he took no actual part in the proceedings: *R* v *London County Council, ex p Akkersdyk* [1892] 1 QB 190; *Dickason* v *Edwards* (1910) 10 CLR 243. The very presence of a person who has brought forward a complaint may, even unconsciously, inhibit the discussions and affect the deliberations of the other members of the tribunal.

In *R* v *Barnsley Council, ex p Hook*,[15] Lord Denning said, inter alia, this:

But when the committee discussed the case and came to their decision, the market manager was there all the time. His presence at all their deliberations is enough to vitiate the proceedings. It is contrary to natural justice that one who is in the position of a prosecutor should be present at the deliberations of the adjudicating committee. This is shown by *R* v *London County Council, ex p Akkersdyk* [1892] 1 QB 190 and *Cooper* v *Wilson* [1937] 2 KB 309.

And, in the same case, Scarman LJ said this at p 1062:

There is respectable authority, to which Lord Denning MR has already referred, which shows that in an appropriate case it is important that the complainant or prosecutor should not participate in a decision or in an appeal from a decision, and should not even appear to participate.

Accordingly, on this ground alone, the applicants are entitled to succeed.

Refusal of application for pre-hearing discovery

But, there is a further ground also why the applicants should succeed.

It is a well-established principle of administrative law that anything that restricts, or appears to restrict, the defendant's ability to present his case may be held to be a breach of procedural fairness and, thereby, susceptible to judicial review; for example, a defendant is generally entitled to notice of evidence that might assist his case. It is, therefore, a breach of natural justice for the prosecution to conceal such evidence: *R* v *Leyland Justices, ex p Hawthorn*.[16]

Both before the commencement of the proceedings before the disciplinary authority and at those proceedings, the applicants had, through their solicitors, asked for all relevant information and documents in the possession of the disciplinary authority on the ground that without such material it would be difficult to put up an adequate defence but they were told that only copies of such documents as the board deemed fit would be supplied at the hearing but that some documents before the board were confidential and could not be supplied though the board would act in accordance with the rules of natural justice.

In particular, the applicants' solicitors by a letter dated 29 October 1985, asked for details as to:

(1) when the decision was made to take disciplinary proceedings;
(2) who took that decision; and
(3) if the decision was taken by the disciplinary authority, who were its members.

Furthermore, the applicants' solicitors asked for:

(1) minutes of the meeting at which the decision was made to take disciplinary proceedings;
(2) copies of any documents or reports that had been received by the disciplinary authority;
(3) copies of statements of witnesses to be called and
(4) fuller particulars of the charges against the applicants.

The applicants' solicitors went on to state in their letter that they could not make satisfactory representation whether oral or in writing without copies of the documents or the information or the clarification requested.

The question which now arises for decision regarding this part of the case is whether the effect of the refusal of the disciplinary authority to accede to the requests of the applicants' solicitors and counsel for, what I shall, for the sake of brevity and convenience refer to as 'pre-trial discovery', was tantamount to denying the applicants their right to make written representations guaranteed to them under r 27(4)(e) of the said Rules which provide:

> Where the staff member accepts the opportunity to appear in person before the disciplinary authority –
>
> (a) he may make, either orally or in writing or both orally and in writing, such representation as may in the opinion of the disciplinary authority be relevant to the alleged breach of discipline:
>
> Provided that where any representations are to be made in writing, the same shall be forwarded to the disciplinary authority not less than ten days before the aforesaid date of appearance before the disciplinary authority.

In my view, a reading of the above provisions makes it clear that in order that an applicant might be in a position to submit written representations ten days before the date of appearance before the disciplinary authority, he must be in possession of copies of all relevant documents and information relating to the charges brought against him a reasonable time before such date.

I am fortified in my view, and I derive analogical support from r 26(7) of the Public Officers (Conduct and Discipline) General Orders 1980 (Chapter D), which, although it applies only to members of the public service as defined in art 132 of the Constitution so that lecturers of the respondent university are outside its scope, provides:

> If witnesses are examined by the committee, the officer shall be given an opportunity to be present and to question the witnesses on his own behalf and *no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto.* (emphasis added)

In my opinion, r 26(7) of Chapter D has a common law content so that reliance can be placed upon its provisions by the applicants in support of their right to claim pre-trial discovery.

Now, it is right to say, at the risk of being trite, that the right to be heard necessarily means the right to know the case against oneself. It is not difficult to cite an anthology of cases for this proposition. I need no more than refer to the following.

The headnote to the case of *R* v *General Medical Council, ex p Gee*[17] reads:

> The applicant was entitled to the particulars of improper prescribing of drugs which he had requested, since he was entitled to know in advance the standard against which he was judged. The judge had been right therefore to order the council to supply those further particulars and the appeal on that issue would be dismissed.

The headnote to the case of *R* v *Architects' Registration Tribunal, ex p Jaggar*[18] reads:

> It was improper for the tribunal, which acted in a quasi-judicial capacity, to consider and give weight to evidence contained in documents the contents and source of which were not divulged to the applicant. It was not sufficient that the applicant was merely to explain certain information con-

tained in such documents. Since the applicant was, therefore, not given a real and effective opportunity of meeting relevant allegations made against them, the motion to quash the decision of the tribunal must succeed.

In *Ex p Jaggar*,[18] Lewis J said this at p 139, para 1:

> The tribunal had before them, and used, documents which should have been disclosed, or documents which the applicant was entitled to see if they were going to be used by the tribunal. I wish to make it perfectly clear that I am not for one moment suggesting that any of the three members of this tribunal acted in any improper manner in the sense that they did not act bona fide. But they did not, in my view, do what the authorities say they should have done, which was to give a real and effective opportunity to the litigant to deal with, or meet, any relevant allegations made in these documents. Sir Richard Allison and Mr Crocker have each sworn an affidavit, which I need hardly say I entirely accept. But when one looks at those affidavits, especially at the affidavit of Mr Crocker, one finds that he does not say that a fair opportunity was given to the applicant, Mr Jaggar to meet the allegations. The letters referred to were used as material upon which to base 'pertinent questions'. Mr Jaggar was in entire ignorance – indeed, the contrary is not suggested of the fact that the tribunal had before them two letters at least which had been sent by some third party to the admission committee. Whether stating to an applicant: 'We have certain information, A,B,C and D, will you deal with it?' is giving a litigant a real and effective opportunity of dealing with the matter when the litigant is not told who the informant is, I do not decide. I am extremely doubtful whether anything short of telling the litigant what the information is and what source it came from would be giving him a real and effective opportunity of dealing with it. When that is not done, as it was not done in this case, and the tribunal has before it correspondence of this nature which is not disclosed, and the tribunal looks at that correspondence and base what they call relevant questions upon that correspondence, it seems to me, as I view it, that that is not doing what this tribunal in its position should have done, namely, if they looked at the letters at all, to inform the litigant what they contained and the source from which they came. I wish to repeat that no suggestion is made as to the integrity or bona fides of any members of the tribunal, or of Mr Wicks, or anybody else.

In *Crompton* v *GMC*,[19] a decision of the Privy Council, it was held, in the circumstances of that case, that by refusing to allow the doctor to see the psychiatrist's reports or to inform him of their contents, the committee had failed to observe the rules of natural justice.

In *Crompton* v *GMC (No 2)*[20] at p 895, Lord Brightman speaking for the Privy Council, said:

> ... it is clearly desirable that the mental condition which triggers s 37 of the Medical Act 1983 should be notified to the practitioner with as much particularity as is reasonable and practical, so that he knows what case he has to meet.

In *BSS Kanda* v *Government of the Federation of Malaya*,[21] Lord Denning speaking for the Privy Council said:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn LC in *Board of Education* v *Rice* down to the decision of their Lordships' Board in *Ceylon University* v *Fernando*. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough ... Applying these principles their Lordships are of the opinion that Inspector Kanda was not in this case given a reasonable opportunity of being heard. They find themselves in agreement with the view expressed by Rigby J in these words:
>
> 'In my view, the furnishing of a copy of the findings of the board of inquiry to the adjudicating officer appointed to hear the disciplinary charges, coupled with the fact that no such copy was furnished to the plaintiff, amounted to such a denial of natural justice as to entitle this court to set aside those proceedings on this ground. It amounted, in my view, to a failure to afford the plaintiff a reasonable opportunity of being heard in answer to the charge preferred against him which resulted in his dismissal.'
>
> The mistake of the police authorities was no doubt made entirely in good faith. It was quite proper to let the adjudicating officer have the statements of the witnesses. The Regulations show that it is necessary for him to have them. He will then read those out in the presence of the accused. But their Lordships do not think it was correct to let him have the report of the board of inquiry unless the accused also had it so as to be able to correct or contradict the statements in it to his prejudice.

Turning to the particular circumstances of the present case, so far as the applicant Hashim is concerned, my attention was drawn by his counsel to the fact that nowhere in the complaint by Mr Ogle was any reference made to any report of alleged offences involving students. 'How then,' asked counsel, 'did the disciplinary committee become aware of such alleged offences?'

Having regard to the provisions as to the disciplinary procedure, in particular, rr 25 and 27 of the said Rules, it is clear that it is the disciplinary authority itself that makes a preliminary investigation as to whether the breach of discipline complained of merits the prescribed punishment and, if so satisfied, conducts a formal hearing. Those Rules therefore envisage that the disciplinary authority must be already in possession of all relevant documents *before* the hearing and it can be reasonably presumed that in the present case that was so. Indeed, no attempt was made to suggest the contrary by counsel for the respondent university.

I should add, lest I be accused of an oversight, that I have considered the authorities cited by counsel for the respondent university in support of his contention that the denial of pre-trial discovery in this case did not

amount to a breach of the rules of natural justice. I now propose to refer to those authorities and shall attempt to demonstrate why they are distinguishable.

In *Wiseman* v *Borneman*,[22] the registrar of a tribunal appointed under the Finance Act 1960 had refused the taxpayer's request to be given copies of the Inland Revenue's certificate and counter-statement, whereupon the taxpayer commenced proceedings for a declaration as to whether the tribunal was bound to accede to his request. The House of Lords ruled against the taxpayer. The following extracts from the judgment of their Lordships will make it self-evident why the case is distinguishable from the present case.

At p 308C, Lord Reid said:

> In the great majority of cases which came before this tribunal all the relevant facts are known to the taxpayer and he has a full opportunity to set out in his statutory declaration all the facts which he thinks are relevant and also all arguments on which he relies. The only advantage to him of having a right to see and reply to the counter-statement of the commissioners would then be that he could reply to their arguments. If the tribunal were entitled to pronounce a final judgment against the taxpayer, justice would certainly require that he should have a right to see and reply to this statement, but all the tribunal can do is to find that there is a prima facie case against him.

At p 313G, Lord Donovan said this:

> The commissioners replied that they would send a copy if the tribunal found that there was a prima facie case for proceeding.

And at p 315G, his Lordship continued:

> Moreover, any unfairness to the taxpayer in his not seeing the counter-statement before it is considered by the tribunal is, in my view, more apparent than real. In view of the complexity of fiscal legislation, transactions which have a tax advantage in view, whether as a main object or not, have to be planned with considerable care and usually with professional assistance. It is well known to the taxpayer or his advisers what has to be done and when; and if other persons are to play a part, just what they have to do and when; and what tax advantage is expected to accrue, and when. The taxpayer or his adviser will also have a fairly shrewd idea where any weakness of the scheme lies in relation to s 28, and, therefore, to what points any eventual counter-statement of the commissioners is likely to be directed. Accordingly, while it is possible that that counter-statement may introduce new facts outside the taxpayer's knowledge, the cases where this would happen are likely to be much more the exception than the rule.

In *Paul Wallis Furnell* v *Whangarei High Schools Board*,[23] a complaint had been made against the appellant, a teacher, to his school board, the respondent, which then suspended the appellant pending determination by the teachers' disciplinary board. The teacher had not been heard by the school board. He therefore applied for prohibition to prevent the teachers' disciplinary board from hearing the charges and for certiorari to quash the respondent's decision.

Furnell's case[23] is, therefore, readily distinguishable because there the board that suspended the teacher pending the hearing was not the body that would make the decision, that being left to the teachers' disciplinary board, whereas here the disciplinary authority conducted both the preliminary investigation and the final hearing.

The following extracts from the judgments of some of their Lordships in *Furnell's* case[23] will make the distinction clear.

Headnote (1) to the case reads: That one of the principles of natural justice was that a man should not be condemned unheard, but the sub-committee neither condemned nor criticized.

And Lord Morris at p 673E said this:

> The contrast is very marked between the preliminary investigation of a complaint and the investigation of a charge for the purposes of a hearing and determination.

And at p 679G his Lordship added:

> Natural justice is but fairness writ large and juridically. It has been described as fairplay in action.

Another case relied on by counsel for the respondent university on this point was *Lewis* v *Heffer*[24] where the facts were that there had been faction fighting within the ranks of the Labour Party in Newham north-east constituency resulting in utter chaos. The Party's National Executive Committee considered that the matter was serious enough to call for an inquiry and suspended the officers concerned pending the inquiry. The officers were not heard and commenced proceedings challenging their suspensions.

It was held that there had been no breach of the rules of natural justice.

Geoffrey Lane LJ said this at p 368h:

> It is impossible for the NEC at that stage, and I emphasize those words 'at that stage', to hear both sides. In most types of investigation there is in the early stages a point at which action of some sort must be taken and must be taken firmly in order to set the wheels of investigation in motion. Natural justice will seldom if ever at that stage demand that the investigator should act judicially in the sense of having to hear both sides. No one's livelihood or reputation at that stage is in danger. But the further the proceedings go and the nearer they get to the imposition of a penal sanction or to damaging someone's reputation or to inflicting financial loss on someone, the more necessary it becomes to act judicially, and the greater the importance of observing the maxim, audi alteram partem.

The facts in *Lewis* v *Heffer*[24] are therefore poles apart from the facts in the present case where the disciplinary authority, having decided to take disciplinary action, then proceeds to consider whether the alleged disciplin-

ary breach merits punishment of dismissal or some lesser punishment: r 25 of the said Rules.

Procedural unfairness at the hearing

I must next turn to consider another ground relied upon by the applicants as showing a lack of fairness on the part of the disciplinary authority and this it was said was reflected in the procedure it adopted in the examination of certain student witnesses whose testimony was most material to charges 3, 4 and 5 which the applicant Hashim faced.

It was accepted that whilst the disciplinary authority was not bound to observe strictly the procedure which applied to courts of law, nevertheless this did not mean that it had carte blanche to follow any procedure it chose. That this must be so is I think dictated by the principle that the disciplinary authority had to act with fairness.

A copy of the record of proceedings before the disciplinary authority provided to this court, showed that over the objections of counsel for the applicants, members of the disciplinary authority persisted in telling the student witnesses before they testified what evidence was expected of them.

Counsel for the applicants had pointed out to the disciplinary authority in the course of his objection that as there was going to be an acute conflict of evidence between the testimony which the applicant Hashim would be giving and that which the students would need to say if the charges concerned were to be established, it was vital that the testimony elicited from these students should be unaided.

It was argued for the respondent university that the procedure adopted could be justified because no prosecuting officer appeared before the disciplinary authority and also that the disciplinary authority did not have the advantage of legal advice. With respect, I do not consider that there is substance in either of these arguments.

The fact that no prosecuting officer appeared before the disciplinary authority does not afford an excuse for examining these witnesses in the manner aforesaid bearing in mind that it was essential for it to observe the principle of fairness. Similarly, the point about the disciplinary authority not having had the advantage of legal advice, will not avail the respondent university bearing in mind that the state legal adviser was a member of the panel which constituted the disciplinary authority.

The result therefore was that to a hypothetical impartial observer present at the proceedings before the disciplinary authority, the procedure it adopted, in insisting on telling the student witnesses what evidence they should give notwithstanding the strong objections of counsel for the applicants, it would have seemed that justice was not being done. In this context appearance is as important as reality.

So, for example, in *R* v *Weston-super-Mare Justice, ex p Taylor*,[25] one of the justices closed her eyes and looked down, giving the defendant's solicitor the impression that she was unwell. On an application for judicial review, it was held that she ought to have withdrawn and the decision was quashed.

It follows, therefore, that the applicants have established a breach of the principle enunciated by Hewart CJ in *R* v *Sussex Justices, ex p McCarthy*:[26]

> ... it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

Accordingly, on this ground also the applicants are entitled to succeed.

Duty to give reasons

I must next consider another objection taken by the applicants. It was submitted that the law has developed to a stage where there is a general duty to provide reasons even when the relevant authority acts in a quasi-judicial matter. In support, the following passage in the judgment of Bhagwati J (as he then was) in *Siemens Engineering & Manufacturing Co* v *Union of India*[27] was cited:

> It is now settled law that where an authority makes an order in exercise of a quasi-judicial function, it must record its reasons in support of the order it makes. Every quasi-judicial order must be supported by reasons.
>
> The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process ...

With great respect to Bhagwati J, I consider that if the requirement for reasons is essential for *every* quasi judicial order, then it would place administrative bodies in a very difficult position.

But, having said that, I accept that there are certain cases where reasons for decision should be given particularly when there is a right of appeal, since an appeal is merely a continuation of proceedings by way of rehearing and litigants as well as the appellate tribunal are entitled to know the reasons for the finding.

In *Breen* v *Amalgamated Engineering Union*,[28] Lord Denning MR observed that where a person 'has some right or interest, or some legitimate expectation, of which it would not be fair to deprive him without a hearing or reasons given, then these should be afforded him, according as the case may demand'.

Though Lord Denning gave a minority judgment in that case the majority did not disagree with him on that point.

In the present case, it was argued, and I agree, that in a university environment, the exercise of reason and intellect are encouraged. The applicants are academics and should be told of the scope of free speech and interaction with students and why their defences were rejected. The giving of reasons for decision in a situation such as this would also serve as a guide to other academics in the position of the applicants. Moreover, the applicants' livelihood was at stake. As was well put by Lord Denning in *Breen's* case,[28] at p 191:

> If a man seeks a privilege to which he has no particular claim – such as an appointment to some post or other – then he can be turned away without a word. He need not be heard. No explanation need be given: see the cases cited in *Schmidt* v *Secretary of State for Home Affairs* [1969] 2 Ch 149. But if he is a man whose property is at stake, or who is being deprived of his livelihood, then reasons should be given why he is being turned down, and he should be given a chance to be heard.

In certain circumstances, which I have endeavoured to indicate, a reasoned decision can be an additional constituent of the concept of fairness. I am satisfied that having regard to all the circumstances the present case was such a case. The applicants are also entitled to succeed on this ground since neither the disciplinary authority nor the university council gave any reasons for their decision.

The ultra vires point

I now come to the last of the grounds urged upon me which affects only the applicant Hashim which I find necessary to deal with.

It was argued on his behalf that the council in substituting the penalty of reduction in salary by five salary increments for a period of five years, had exceeded the powers conferred upon it by the said Rules.

In order to appreciate this submission it is necessary to reproduce the relevant provisions in the said Rules relating to penalties which may be imposed by the disciplinary authority; they are as follows:

> 33 The disciplinary authority may impose on a staff member any one, or any appropriate combination of two or more, of the following punishments:
> (a) warning;
> (b) fine;
> (c) forfeiture of salary;
> (d) reduction of salary;
> (e) reduction in rank;
> (f) dismissal.
>
> 35(1) Where the disciplinary authority imposes the punishment of reduction of salary, it may reduce the salary of the staff member to such point in the salary scale of *his grade* and for such period as it deems fit.
> (emphasis added)

I must next reproduce the relevant provisions in the Universities and University Colleges Act 1971, relating to the powers of the council when hearing appeals from any decision of the disciplinary authority; they are as follows:

> 16A(5) Any member of the staff, officer or employee of the university who is dissatisfied with the decision of the disciplinary committee or of any person or board delegated with functions, powers or duties under subsection (3) may appeal against such decision to the university council which may give such decision as it deems fit and proper.

Two things are clear from a reading of the above provisions; firstly, the power conferred upon the disciplinary authority to impose upon a staff member the punishment of reduction in salary, is limited 'to such point in the salary scale of *his grade*', and secondly, no express power is conferred upon the council to increase any of the punishments imposed by the disciplinary authority.

In these circumstances, can the power to increase punishment be implied in favour of the council by reason of the general words 'may give such decision as it deems fit and proper' appearing in s 16A(5)? I think not.

Section 16A(5) is confined to appeals by a staff member only and, indeed, there is no provision for appeals by the disciplinary authority. It follows, therefore, that the power conferred upon the council 'to give such decision as it deems fit and proper' must be construed as empowering the council if it considers that there is no sufficient ground for interfering to dismiss the appeal by the staff member and confirm the punishment imposed by the disciplinary authority or if it considers that there is sufficient ground for interfering, to allow such appeal and reverse the finding and punishment by entering an order of acquittal or to alter the finding, maintaining the punishment with or without altering the finding to reduce the punishment. It goes without saying, therefore, that in no circumstances may the council enhance a punishment imposed by the disciplinary authority since such a power, which must be a creature of statute, is not given to the council. Certainly, neither the disciplinary authority nor the council were empowered to impose the punishment of reduction in salary in excess of the limitation imposed by r 35 of the said Rules.

I regret, therefore, that I am unable to agree with the decision of Wan Hamzah J (as he then was) in *Norliah bte Shukri* v *University of Malaya & Anor*[29] wherein he held that there was nothing in s 16B(5) of the Universities and University Colleges Act 1971 to prevent the minister concerned from enhancing punishment having regard to the words 'may give such decision on the appeal as he deems fit'.

With respect to the learned judge, the question was *not* whether there was anything in the provisions of the statute *to prevent* the minister from enhancing punishment but rather whether there was anything therein *empowering* him to do so.

Now, those being my views, as regards the powers of the council on appeal, how do they affect the applicant Hashim?

They affect him in this way: it was common ground that when the council substituted the punishment of a reduction of salary by five salary increments for five years, this had the effect of reducing him in the salary scale from salary grade A10 to grade A11. But, as has been emphasized, r 35(1) of the said Rules expressly limits the power conferred upon the disciplinary authority to reduce the salary of a staff member 'to such point in the salary scale of his grade'. This limitation must, of course, also apply to the council.

Accordingly, in imposing the substituted punishment of reduction in salary which it did in fact impose the council had acted ultra vires the powers conferred upon it and therefore without jurisdiction.

In all the circumstances, certiorari must go in terms of both applications and with costs.

I am now prepared to hear arguments as to any consequential orders I should make.

Applications allowed.

Solicitors: *Zain & Co.*

Reported by *Prof Ahmad Ibrahim*

Kien Tat Sdn Bhd v Klockner Industrie-Anlagen GmbH

HIGH COURT (KUALA LUMPUR) – CODE NO D1-23-1920-87
GUNN CHIT TUAN J
16 JANUARY 1989

Arbitration – Stay of civil suit proceedings pursuant to arbitration clause in main contract – Application for – Agreement in addendum to main contract to transfer $3m to defendant's account – Dispute regarding transfer – Whether transfer was a loan or a form of security for due performance of plaintiff's obligations – Whether dispute was an independent issue or a dispute arising out of main contract – Provision in main contract to refer disputes and controversies to arbitration – Arbitration Act 1952, s 6

The Malaysian branch of the defendant applied for an order that all further proceedings in the civil suit action by the plaintiff against it be stayed pursuant to s 6 of the Arbitration Act 1952 in that the parties have in a contract dated 25 May 1985 expressly agreed to refer to arbitration any dispute or controversy arising out of the contract. It was the defendant's contention that the plaintiff's claim related to that contract and that the dispute was within the purview of that contract. The defendant also submitted that the parties had entered into a supplementary agreement known as addendum I wherein it was mutually agreed that a sum of $3m would be transferred to the defendant as a form of security for the due performance of the plaintiff's obligations under the contract, but not as a loan as pleaded by the plaintiff.

Held, allowing the defendant's application:

(1) The claim of the plaintiff in this case is really disputed and therefore gives rise to a 'dispute' calling the arbitration clause into operation.

(2) The said addendum I, which forms part of the contract of 25 May 1985, must be read together with it. The reason for the transfer of the $3,000,000 referred to in the said addendum I is not therefore an independent issue. The dispute or controversy regarding the transfer of the $3,000,000 in accordance with a clause in the said addendum I is therefore a dispute or claim which arose out of or was related to the contract as envisaged in its art 37. It is a dispute 'in respect of a matter agreed to be referred to arbitration' within s 6 of the Arbitration Act 1952.

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 539 of 1988.]

Cases referred to

1 *Ellerine Brothers (Pty) Ltd & Anor* v *Klinger* [1982] 1 WLR 1375 (refd)
2 *Associated Bulk Carriers Ltd* v *Koch Shipping Inc (The 'Fuohsan Maru')* [1978] 1 Lloyd's Rep 24 (refd)
3 *Ellis Mechanical Services Ltd* v *Wates Construction Ltd* [1978] 1 Lloyd's Rep 33 (distd)
4 *KSM Insuran Bhd* v *Ong Ah Bah & Anor* [1986] 1 MLJ 237 (distd)
5 *London & North Western Railway* v *Jones* [1915] 2 KB 35 (refd)

Legislation referred to

Arbitration Act 1952 s 6

Datuk Dominic Puthucheary (*Chia Loong Thye* with him) for the plaintiff/respondent.
C Abraham (*J Ding* with him) for the defendant/appellant.

Cur Adv Vult

Gunn Chit Tuan J: The Malaysian branch of Klockner Industrie-Anlagen GmbH (the defendant) applied by way of summons-in-chambers dated 21 July 1987 for an order that all further proceedings in the action known as Civil Suit D1-23-1920-87 by Kien Tat Sdn Bhd (the plaintiff) against it be stayed pursuant to s 6 of the Arbitration Act 1952, in that the parties have an agreement in writting dated 25 May 1985 and have expressly agreed to refer to arbitration the matters in respect of which the action was brought.

In an affidavit dated 17 July 1987 affirmed by one KA Benckendorff, the regional director of the defendant, it was stated that the plaintiff's statement of claim related to a contract which was entered into between the parties and that there are now disputes within the purview of the contract. Reference was made to the following art 37 of the said contract between the parties dated 25 May 1985 wherein it was the intention of the parties to refer any

Rohana bte Ariffin & Anor v Universiti Sains Malaysia

HIGH COURT (PENANG) – ORIGINATING MOTION 32-17-86
EDGAR JOSEPH JR J
20 JANUARY 1989

Administrative Law – Application for certiorari to quash decisions of university council dismissing appeals from disciplinary authority of university – Principles for review of decisions of public authorities and inferior tribunals – Presence of registrar, the complainant, during the deliberations of the disciplinary authority – Refusal of application for pre-trial discovery of documents – Procedural unfairness at hearing – Duty to give reasons – Penalty imposed ultra vires the Rules – Universiti Sains Malaysia (Discipline of Staff) Rules 1979, rr 4, 14, 27, 33 & 35 – Universities and University Colleges Act 1971, s 16A

University – Disciplinary action against lecturers – Appeal against decision of disciplinary authority dismissed – Application for certiorari to quash decision of university council dismissing the appeals – Presence of registrar, the complainant, during the deliberations of the disciplinary authority – Refusal of application for pre-trial discovery of documents – Procedural unfairness at hearing – Duty to give reasons – Penalty imposed ultra vires the Rules – Universiti Sains Malaysia (Discipline of Staff) Rules 1979, rr 4, 14, 27, 33 & 35 – Universities and University Colleges Act 1971, s 16A

In this case the applicants, lecturers in the respondent university, applied for orders of certiorari to quash the decisions of the council of the respondent university dismissing their appeals from decisions of the relevant disciplinary authority.

The first applicant had been charged with the offence of making a public statement on policies and decisions of the respondent university in relation to a matter when such statement would be detrimental to such policies of the university in contravention of rr 4 and 18 of the Universiti Sains Malaysia (Discipline of Staff) Rules 1979. She was found guilty by the disciplinary authority. The second applicant had been found guilty of (a) a charge of making a public statement on a matter that would be detrimental to the policies and decisions of the respondent university in contravention of rr 4 and 18 of the said Rules, (b) a charge alleging conduct which was irresponsible, an offence under r 4(2) of the Rules, and (c) two charges of inciting students on separate occasions to boycott activities organized by the student affairs department of the university. The university council in confirming the finding of guilt recorded by the disciplinary authoriy against the first applicant allowed her appeal against sentence by substituting for the punishment of a warning and a reduction of salary of two salary increments to last for one year from 1 February 1986, a warning and a reduction of salary by one increment for a period of one year from 21 February 1986 to 20 February 1987.

In the case of the second applicant, the university council, whilst confirming the findings of guilt recorded by the disciplinary committee against him, allowed his appeal against sentence by substituting in place of the punishment of dismissal, the sentence of a warning and a reduction of salary increment to last from 21 February 1986 to 20 February 1991.

Held: allowing the application:

(1) The proceedings before the disciplinary authority were contrary to natural justice owing to the presence of the registrar of the respondent university, the complainant in the case of both the applicants, during the disciplinary authority's deliberations. In this case the registrar was very far from being a mere nominal complainant and had shown active partisanship in the proceedings before the disciplinary authority.

(2) It is a well-established principle of administrative law that anything that restricts or appears to restrict the defendant's ability to present his case may be held to be a breach of procedural fairness and is thereby susceptible to judicial review. In this case the disciplinary authority had refused to accede to the requests of the applicants' solicitors and counsel for pre-trial discovery. This was tantamount to denying the applicants their right to make written representations. The right to be heard necessarily means the right to know the case against oneself.

(3) The copy of the record of proceedings before the disciplinary authority showed that over the objections of counsel for the applicants, members of the disciplinary committee persisted in telling the student witnesses before they testified what evidence was expected of them. This showed that justice was not being done and was a breach of the principle that justice should not only be done but should manifestly and undoubtedly be seen to be done.

(4) Having regard to all the circumstances in the present case, a reasoned decision can be an additional constituent of the concept of fairness. Neither the disciplinary authority nor the university council gave reasons for their decision and the applicants are entitled to succeed on this ground.

(5) The university council may in no circumstance enhance a punishment imposed by the disciplinary authority since such a power, which must be the creature of statute, is not given to the council. Neither the disciplinary authority nor the council were empowered to impose the punishment of reduction in salary in excess of the limitation imposed by r 35 of the Rules. The punishment of reduction of salary by five salary increments for five years imposed by the council on the second applicant had the effect of reducing him from salary grade A10 to grade A11 and was therefore ultra vires the Rules.

(6) In all the circumstances, certiorari must go in terms of both the applications.

Cases referred to

1 *Associated Provincial Picture Houses* v *Wednesbury Corporation* [1948] 1 KB 223; [1947] 2 All ER 680 (refd)
2 *Ridge* v *Baldwin* [1964] AC 40 (refd)
3 *Padfield* v *Minister of Agriculture, Fisheries & Food* [1968] AC 997 (refd)
4 *Anisminic* v *Foreign Compensation Commission* [1969] 2 AC 147 (refd)
5 *Secretary of State for Education & Science* v *Tameside BC* [1977] AC 1014 (refd)
6 *Chief Constable of the North Wales Police* v *Evans* [1982] 1 WLR 1155; (1982) 3 All ER 141 (refd)
7 *O'Reilly* v *Mackman* [1983] 2 AC 237 (refd)
8 *Law* v *National Greyhound Racing Club Ltd* [1983] 1 WLR 1302; [1983] 3 All ER 300 (refd)
9 *Square Meals Frozen Foods Ltd* v *Dunstable Corporation* [1974] 1 WLR 59; [1974] 1 All ER 441 (refd)
10 *R* v *Crown Court at Ipswich, ex p Baldwin* [1981] 1 All ER 596 (refd)
11 *Council of Civil Service Unions* v *Minister for the Civil Service* [1984] 3 WLR 1174; [1984] 3 All ER 935 (refd)
12 *Bugdaycay* v *Secretary of State for the Home Department* [1987] 1 All ER 940 (refd)
13 *Cooper* v *Wilson* [1937] 2 KB 309 (refd)

14 *Stollery* v *Greyhound Racing Control Board* (1972) 128 CLR 509 (refd)
15 *R* v *Barnsley Council, ex p Hook* [1976] 1 WLR 1052 (refd)
16 *R* v *Leyland Justices, ex p Hawthorn* [1979] QB 283 (refd)
17 *R* v *General Medical Council, ex p Gee* [1987] 1 All ER 1204 (refd)
18 *R* v *Architects' Registration Tribunal, ex p Jaggar* [1945] 2 All ER 131 (refd)
19 *Crompton* v *GMC* [1981] 1 WLR 1435 (refd)
20 *Crompton* v *GMC (No 2)* [1985] 1 WLR 885 (refd)
21 *BSS Kanda* v *Government of Federation of Malaya* [1962] MLJ 169 (refd)
22 *Wiseman* v *Borneman* [1971] AC 297 (distd)
23 *Paul Wallis Furnell* v *Whangarei High Schools Board* [1973] AC 660 (distd)
24 *Lewis* v *Heffer* [1978] 3 All ER 354 (distd)
25 *R* v *Weston-super-Mare Justice, ex p Taylor* [1981] Cr LR 179 (refd)
26 *R* v *Sussex Justices, ex p McCarthy* [1924] 1 KB 256 (refd)
27 *Siemens Engineering & Manufacturing Co* v *Union of India* AIR 1976 SC 1785 (refd)
28 *Breen* v *Amalgamated Engineering Union* [1971] 2 KB 175 (refd)
29 *Norlia bte Shukri* v *University of Malaya & Anor* [1983] 1 MLJ 100 (not folld)

Legislation referred to
Federal Constitution art 132
Public Officers (Conduct and Discipline) General Orders 1980 (Chapter D) r 26(7)
Universiti Sains Malaysia (Discipline of Staff) Rules 1979 rr 4, 14, 27, 33, 35
Universities and University Colleges Act 1971 s 16A

Tuan Haji Sulaiman bin Abdullah (E Sree Santhan and *Sivarasa Rasiah* with him) for the applicants.

Raja Abdul Aziz Addruse (*NG Sivanandan* with him) for the respondent.

Cur Adv Vult

Edgar Joseph Jr J: These applicants, Rohana bte Ariffin and Hashim Hussin Yaacob, both lecturers in Sociology and Development Studies at the Universities Sains, Malaysia, the respondent herein, have applied for orders of certiorari to remove into this court for the purpose of them being quashed two separate decisions of the council of the respondent university ('the council'), dated 10 March 1986, dismissing their appeals from decisions of the relevant disciplinary authority ('the disciplinary authority').

In the case of the applicant Hashim, he had been found guilty by the disciplinary authority of four of the six offences charged, namely:

(a) a first charge of making a public statement on a matter that would be detrimental to the policies and decisions of the respondent university in relation thereto and thereby committed an offence under r 18(1) of the Universiti Sains Malaysia (Discipline of Staff) Rules 1979 (hereinafter referred to as 'the said Rules') and acted so as to bring discredit to the reputation of the respondent university, and thereby committed an offence under r 4(2)(d) of the said Rules;
(b) a second charge alleging conduct which was irresponsible, an offence under r 4(2) of the said Rules;
(c) two charges of, inter alia, inciting students, on separate occasions, to boycott activities organized by the student affairs department of the respondent university which were offences under r 4(2)(g) and 4(2)(j) of the said Rules.

The council, whilst confirming the findings of guilt recorded by the disciplinary authority against him on the charges aforesaid, allowed his appeal against sentence by substituting, in place of the punishment of dismissal, the sentence of a warning and reduction of salary by five salary increments to last from 21 February 1986 to 20 February 1991.

In the case of the applicant Rohana, she had been found guilty by the disciplinary authority of an offence of making a public statement of the policies and decisions of the respondent university in relation to a matter when such statement would be detrimental to such policies of the respondent university in contravention of r 18(1) and had thereby also acted irresponsibly in contravention of r 4(2)(g) of the said Rules.

The council whilst confirming the finding of guilt recorded by the disciplinary authority against the applicant Rohana on the charge aforesaid allowed her appeal against sentence by substituting, in place of the punishment of a warning and a reduction of salary by two salary increments to last for one year from 1 February 1986, a warning and a reduction of salary by one increment for a period of one year from 21 February1986 to 20 February 1987.

Before me, the decisions of the council had been impugned on a number of grounds but having regard to the conclusions at which I have arrived regarding some of these it is unnecessary for me to deal with the rest.

I would at the outset say that in considering these applications I have kept in the forefront of my mind the basic principles to be distilled from a number of cases upon which courts will review decisions of public authorities and inferior tribunals.

The basic principles may be stated thus:

(1) judicial review applies to any body of persons having legal authority derived from public law to determine questions affecting the rights of subjects whether that right is derived from statute or from the common law:
(2) the High Court is not a Court of Appeal from the body under review;

(3) the High Court limits itself to determining whether the public authority or inferior tribunal has acted lawfully, rationally and with due regard to proper procedures;
(4) the court will not substitute its judgment or discretion for the judgment or discretion of the body under review;
(5) facts determined by the body under review are rarely open to review in the High Court;
(6) the High Court will intervene unless there is express statutory direction to the contrary;
(7) if there is an established appeal procedure from the decision of the body under review the court usually prefers this course to be followed;
(8) only activities of a public nature can be the subject of judicial review.

The cases from which I have distilled the above principles are: *Associated Provincial Picture Houses* v *Wednesbury Corporation*,[1] *Ridge* v *Baldwin*,[2] *Padfield* v *Minister of Agriculture, Fisheries & Food*,[3] *Anisminic* v *Foreign Compensation Commission*,[4] *Secretary of State for Education & Science* v *Tameside BC*,[5] *Chief Constable of the North Wales Police* v *Evans*,[6] *O'Reilly* v *Mackman*,[7] *Law* v *National Greyhound Racing Club Ltd*,[8] *Square Meals Frozen Foods Ltd* v *Dunstable Corporation*,[9] *R* v *Crown Court at Ipswich, ex p Baldwin*[10] and *Council of Civil Service Unions* v *Minister for the Civil Service*.[11]

I would, however, in passing, and as a matter of general interest, remark that there are dicta in administrative law cases in the UK which indicate that judges there are beginning to depart from their traditional preference of dealing with the technicalities of remedies rather than the principles governing official action and individual rights. For example,in a recent immigration case *Bugdaycay* v *Secretary of State for the Home Department*,[12] in the House of Lords, Lord Bridge stated that courts are entitled within limits:

> to submit an administrative decision to a more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.

And Lord Templeman said this:

> Where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process.

I must now turn to consider the particular circumstances of the present case.

The presence of Mr Ogle, the complainant, during the disciplinary authority's deliberations

It was argued that the proceedings before the disciplinary authority were contrary to natural justice owing to the presence of Mr NA Ogle, the registrar of the respondent university, the secretary of the disciplinary authority, the secretary of the university council and the complainant in the case of both the applicants, during the disciplinary authority's deliberations.

For a better appreciation of this point, it would, I think, be useful if I reproduced the reports made by Mr Ogle dated 17 September 1985, to the vice chancellor, which set the machinery of the disciplinary proceedings in motion against the applicants.

The report made by Mr Ogle against the applicant Hashim was in the following terms:

> 1 I, as secretary of the disciplinary committee, Universiti Sains Malaysia, wish to report officially that a staff member of Universiti Sains Malaysia, namely, Mr Hashim Hussin bin Yaacob, who works as a lecturer at the School of Social Sciences, has made public statements in the newspapers, *The Star* (25 August 1985) and *The New Straits Times* (26 August and 17 September 1985). The public statements referred to are attached together with this report as lampiran A. In those public statements, Mr Hashim Hussin bin Yaacob has made various allegations against the administration of the university, quality of education, aspects of service mainly promotion and the appointment of dean. His behaviour as such may be construed as contravening r 18(1) of the Universiti Sains Malaysia (Discipline of Staff) Rules 1979 which reads as follows:
>
> 'A staff member shall not, either orally or in writing or in any other manner, make any public statement on the policies or decisions of the university in relation to any matter, or circulate any such statement whether made by him or any other person:
> Provided that this rule shall not apply to any public statement made by a staff member with the prior approval of the vice chancellor in connection with the performance of the duties of his office.'
>
> 2 The public statements referred to above are detrimental to the policies and decisions of the university and overall, have caused odium to the university. Therefore for these reasons, Mr Hashim Hussin bin Yaacob can be said to have conducted himself so as to bring the university into disrepute or to bring discredit thereto which is an offence under r 4(2)(d) and also 'be irresponsible', an offence under r 4(2)(g) of the Universiti Sains Malaysia (Discipline of Staff) Rules 1979.
>
> 3 Due to the conduct of Mr Hashim Hussin bin Yaacob as reported above, it is recommended to the Honourable Datuk to forward this matter for the consideration of the disciplinary committee of Universiti Sains Malaysia so that appropriate action may be brought against him.

The report made by Mr Ogle against the applicant Rohana was in the following terms:

1 I, as secretary of the disciplinary committee, Universiti Sains Malaysia, wish to report officially that a staff member of Universiti Sains Malaysia, namely, Mrs Rohana bte Ariffin, who works as a lecturer at the School of Social Sciences, has made a public statement in the newspaper, *The Star*, on 27 August 1985. The public statement referred to is attached together with this report as lampiran A. In that public statement, Mrs Rohana bte Ariffin has expressed support for the public statements made by Mr Hashim Hussin bin Yaacob prior to this date. As reported to the Honourable Datuk, the public statements made by Mr Hashim Hussin bin Yaacob prior to 27 August 1985 may be construed as violating r 18(1) of the Universiti Sains Malaysia (Discipline of Staff) Rules 1979. As such, the support expressed by Mrs Rohana bte Ariffin through her public statement towards the public statements made by Mr Hashim Hussin bin Yaacob prior to that may also be construed as contravening r 18(1) of the Universiti Sains Malaysia (Discipline of Staff) Rules 1979 which reads as follows:

'A staff member shall not, either orally or in writing or in any other manner, make any public statement on the policies or decisions of the university in relation to any matter, or circulate any such statement whether made by him or any other person:
Provided that this rule shall not apply to any public statement made by a staff member with the prior approval of the vice chancellor in connection with the performance of the duties of his office.'

2 The public statement referred to above is detrimental to the policies and decisions of the university and overall has caused odium to the university. Therefore for these reasons, Mrs Rohana bte Ariffin can be said to have conducted herself so as to bring the university into disrepute or to bring discredit thereto which is an offence under r 4(2)(d) and also 'be irresponsible', an offence under r 4(2)(d) of the Universiti Sains Malaysia (Discipline of Staff) Rules 1979.

3 Due to the conduct of Mrs Rohana bte Ariffin as reported above, it is recommended to the Honourable Datuk to forward this matter for the consideration of the disciplinary committee of Universiti Sains Malaysia so that appropriate action may be brought against her.

Mr Ogle had also affirmed an affidavit in opposition dated 29 July 1987, on behalf of the respondent university wherein appear substantial particulars of the grounds why it was said the applicants should be denied the reliefs prayed for.

Most particularly, after having deposed by way of introduction that he was duly authorized by the respondent university to affirm the affidavit on its behalf and that he had personal knowledge of the matters deposed therein, he referred to the grounds upon which the applicants had attacked the decision of the disciplinary authority; these grounds were as follows:

(a) that there was bias or a real likelihood of bias on the part even of the new disciplinary authority by reason of its chairman being the deputy vice chancellor of the respondent university, in that he would or was likely to be influenced against the applicants, considering the nature of the charges preferred against the applicants;

(b) that the disciplinary authority showed its bias when it refused to furnish to the applicants, in advance of the hearing, necessary documents and information;

(c) that the disciplinary authority failed to observe the rules of natural justice and fairness by its refusal to provide to the applicants copies of documents which it had considered, thereby depriving the applicants of the full and proper exercise of the right to a hearing;

(d) that the applicants in not being informed by the disciplinary authority as to how the statement made had adversely affected the policies and decisions of the respondent, had also been deprived of the full and proper exercise of their rights to a hearing;

(e) that the disciplinary authority had failed to give proper, or any grounds or reasons for its decision; and

(f) that the disciplinary authority acted in excess of jurisdiction by its failure to consider that the second applicant made the statement not in his capacity as a staff member of the respondent, but in his capacity as president of Persatuan Kakitangan Akademik dan Pentadbiran, USM ('PKAPUSM').

Other grounds referred to by Mr Ogle upon which it was alleged by the applicants that the disciplinary authority had erred in law, were as follows:

(a) it failed to appreciate that the making of the statement by the second applicant was justified by reason of necessity;

(b) it failed to consider that the said statement concerned the respondent university as a social institution which was within the field of study of the second applicant, who was, in any event, expressing himself on an academic matter at a workshop organized by PKAPUSM; and

(c) it wrongly construed the second applicant's conduct as 'irresponsible' when he was carrying out his duty as an office-bearer of a registered society and as a sociologist.

In reply, Mr Ogle said this in his affidavit:

6 Arising out of the applicants' objection to the vice chancellor being one of the members of the disciplinary authority, the vice chancellor deliberately took leave in order that one of the two deputy vice chancellors (who then became acting vice chancellor) could be appointed to replace the vice chancellor as member of the disciplinary authority, in compliance with the provisions of s 16(a) of the Universities and University Colleges Act 1971.

7 There is no substance in the applicants' allegation of bias. It is evident from the applicants' said affidavits that the disciplinary authority was reconstituted as a result of, and in deference to, the objection taken by the applicants to the vice chancellor being one of its members.

8 The applicants seek to show the disciplinary authority's bias by reference to its refusal to furnish the copies of

documents and reports, and the further particulars, mentioned in para 53 of the said affidavits. I verily believe that the charges framed against the applicants clearly spell out the case which they had to meet, and such refusal could not have had, and did not have the effect stated in para 54 of the said affidavits.

9 The applicants also seek to show such bias by alleging that the disciplinary authority did not treat their witnesses in the same way the authority did with the student witnesses. I verily believe that the disciplinary authority was quite entitled to deal with the student witnesses differently. Unlike the applicants, the disciplinary authority did not have the services of counsel to examine the student witnesses. It was, therefore, necessary that these witnesses be made aware of the charges being dealt with by the authority in order that they might confine themselves to relevant matters only when giving their evidence. After they were informed of the charges, the student witnesses were left to give whatever evidence they wished. No leading questions were directed at them by the disciplinary authority, and counsel for the applicants were permitted, and had every opportunity, to cross-examine them. At no time prior to their appearance at the hearing had the disciplinary authority heard the student witnesses, or informed them of the charges preferred against the applicants or made any attempt to tell them as to the evidence they should give at the hearing. The allegation that the disciplinary authority treated these witnesses differently because it was biased is unjustified.

10 As to para 57A and 57B of the said affidavits, the press clippings were given to the applicants at the hearing because they went to show that the statement made by the applicants had been detrimental to the well-being of the respondent.

11 Those clippings were in the possession of the officials servicing the disciplinary authority and they had written on them various comments and notations. These comments and notations were irrelevant to the proceedings and were obliterated when given to the applicants.

12 The applicants' allegation that the disciplinary authority had made up its mind against them and was merely going through the motion of conducting a hearing is totally untrue and is disproved by the very fact that the disciplinary authority took time to consider before it made its decision; and the fact that the disciplinary authority found against the applicants on only four of the six charges further shows the allegation to be unfounded.

13 The applicants' contention that the disciplinary authority had erred in law in finding against them in relation to the statements they made (when the same were made in their capacity not as staff members of the respondent but as the acting president and president of the PKA-PUSM respectively) is, I verily believe, untenable. As staff members of the respondent, the applicants had certain responsibilities and were subject to be disciplined if they breached the staff disciplinary regulations.

14 As for para 62 of the said affidavits, the question whether the second applicant had carried out the study mentioned as a formal research activity or as an informal project was asked of the second applicant merely to establish a fact. It is quite unfair of the second applicant to regard and to look upon everything done by the disciplinary authority as having been motivated by bias.

15 It is true that the disciplinary authority did not have any written grounds for its decision, but it came to its said decision after carefully considering the evidence before it. Copies of the notes of the proceedings and the English translations thereof relating to the first and second applicants are now produced and shown to me marked 'NAO 1', 'NAO 2', 'NAO 3' and 'NAO 4' respectively and copies of the same are annexed hereto.

Mr Ogle had also referred to the grounds upon which the applicants had attacked the decision of the council as follows:

(a) to have also committed the same errors in law as did the disciplinary authority, for the reasons stated in para 4 hereof;

(b) to have erred in law and, therefore acted in excess of jurisdiction, in not considering properly or at all the applicants' grounds of appeal; and

(c) to have acted without or in excess of jurisdiction in the punishment it imposed on the applicants.

In reply, Mr Ogle said this in his affidavit:

16 The applicants appealed against the decision of the disciplinary authority, and the appeal was considered by the university council which modified the decision in so far as it related to the punishment imposed. The issues raised in the said affidavits were also raised in the appeals and have been considered by the university council when it decided on the appeals.

And then, generally, Mr Ogle said this in his affidavit:

17 I verily believe that the applicants have not, by the said affidavits, shown any circumstance which warrants the removal to this honourable court of the decisions of the disciplinary authority and of the university council for the purpose of their being quashed.

18 I, therefore, respectfully pray that the applications of the applicants herein be dismissed with costs.

Clearly, having regard to the contents of Mr Ogle's reports and affidavit aforesaid, he had assessed the facts and was very far from being a mere nominal complainant. Indeed, I would go further and say that judging from his reports and his affidavit aforesaid, Mr Ogle had shown active partisanship in the proceedings before the disciplinary authority.

It was common ground that Mr Ogle was in fact present throughout the deliberations of the disciplinary authority and no reasons were vouchsafed to this court as to the necessity for his presence there. I accept that Mr Ogle did not discuss the case with members of the disciplinary authority nor did he take part in their deliberations. The fact remains, however, that he was present with the members of the disciplinary authority during their deliberations and decision.

In *Cooper* v *Wilson*,[13] Greer LJ said this:

I think the cases relied on by Mr Wooll, *R* v *Essex Justices* [1927] 2 KB 475, *R* v *London County Council* [1892] 1 QB

190 and *R* v *Brixton Income Tax Commissioners* (1913) 29 TLR 712 establish the proposition that if the conduct of the justices is such as to give rise to a reasonable suspicion that justice does not seem to have been done, then their decision should be set aside. It is noticeable that in all those cases it was established to the satisfaction of the court that the persons whose presence was complained of when the tribunal was considering its decision in fact took no part in the decision ... I ask myself what would anyone have thought who came into the room where the committee were sitting, after the plaintiff had gone out while those were considering their decision, and found sitting on the Bench with the committee one of the respondents to the appeal who had opened the case, though he had left the calling of the witnesses to Superintendent Hughes. Such a person, if reasonable, would have been likely to say to himself:

'There has been an opportunity here for one of the parties to influence the judgment of the committee, and it looks as if justice may seem not to have been done.'

And, in the same case, this is what Scott LJ said at p 344:

It makes no difference whether he then discussed the case with them or not; the risk that a respondent may influence a court is so abhorrent to English notions of justice that the possibility of it or even the appearance of such a possibility is sufficient to deprive a decision of all judicial force, and to render it a nullity.

In *Stollery* v *Greyhound Racing Control Board*,[14] the facts were these. The Greyhound Racing Board, a body incorporated by statute to control and regulate greyhound racing in New South Wales, made rules which empowered it to inquire into and deal with matters detrimental to the proper conduct of greyhound racing. A greyhound owner sent to the manager of an association which conducted greyhound racing who was also a member of the board an envelope containing forms nominating certain dogs for a race together with $200 in notes. At all material times a greater number of dogs were nominated for races than could be accepted, and the association determined which dogs should be permitted to race. The manager asked for an explanation for the inclusion of the money and was told that it was a gift in respect of the manager's recent marriage. The manager replied that the making of gifts to officials was the type of thing he was fighting against. He then reported the incident to the board. At an inquiry by the board the manager's report was read to the owner, who stated that he had no ulterior purpose in sending the money and that it was a gift to the manager for reasons unconnected with racing. The owner then withdrew. The board deliberated and resolved to charge the owner with conduct detrimental to the proper regulation and control of the sport. The owner was recalled, heard again, and withdrew. The board deliberated further and resolved that he be found guilty and be disqualified for twelve months. *The manager was present in the boardroom throughout the deliberations and decisions, but took no part in them.* (emphasis added)

It was held by the High Court of Australia (1) that the manager was in the position of an accuser in the proceedings and was disqualified from acting as a member of the board in relation thereto, (2) that notwithstanding that there was no dispute involving the overt acts, the manager's presence during the deliberations and decisions of the board was inconsistent with the principles of natural justice, even though he did not participate in the deliberations or decisions.

At p 519, Barwick CJ said, inter alia, this:

The basic tenet that justice should not only be done but be seen to be done does not, of course, warrant fanciful and extravagant assertions and demands. What justice requires will ever depend on circumstances, and the degree to which it should be manifest that it is being done will likewise be related to the particular situation under examination by a supervising tribunal. But, in my opinion, dissatisfaction engendered in the mind of an observer aware of the facts, by the continued presence of Mr Smith in his boardroom, having regard to his personal connection with the matter in hand, is not extravagant or far-fetched. As I have said, a reasonable man could very properly suspect that the clear opportunity which Mr Smith had for influencing the decision of the board might well have been used.

At p 520, Menzies J said, inter alia, this:

A long line of authority establishes that the decision of a tribunal, whose duty it is to act judicially, will be invalidated if, while the tribunal deliberates and reaches a finding adverse to a person whose conduct is under scrutiny, there is present some person who, in fairness, ought not to be there: *R* v *Sussex Justices, ex p McCarthy* [1924] 1 KB 256; *R* v *Essex Justices, ex p Perkins* [1927] 2 KB 475; *Cooper* v *Wilson* [1937] 2 KB 309; *R* v *Camborne Justices, ex p Pearce* [1955] 1 QB 41; *Ex parte Angliss Group* (1969) 122 CLR 546.

At pp 526 and 527, Gibbs J said, inter alia, this:

It is, however, clear that it would not be in accordance with the principles of natural justice for a person who was in truth the accuser to be present as a member of the tribunal when the charge which he had promoted was heard, even if he took no actual part in the proceedings: *R* v *London County Council, ex p Akkersdyk* [1892] 1 QB 190; *Dickason* v *Edwards* (1910) 10 CLR 243. The very presence of a person who has brought forward a complaint may, even unconsciously, inhibit the discussions and affect the deliberations of the other members of the tribunal.

In *R* v *Barnsley Council, ex p Hook*,[15] Lord Denning said, inter alia, this:

But when the committee discussed the case and came to their decision, the market manager was there all the time. His presence at all their deliberations is enough to vitiate the proceedings. It is contrary to natural justice that one who is in the position of a prosecutor should be present at the deliberations of the adjudicating committee. This is shown by *R* v *London County Council, ex p Akkersdyk* [1892] 1 QB 190 and *Cooper* v *Wilson* [1937] 2 KB 309.

And, in the same case, Scarman LJ said this at p 1062:

There is respectable authority, to which Lord Denning MR has already referred, which shows that in an appropriate case it is important that the complainant or prosecutor should not participate in a decision or in an appeal from a decision, and should not even appear to participate.

Accordingly, on this ground alone, the applicants are entitled to succeed.

Refusal of application for pre-hearing discovery

But, there is a further ground also why the applicants should succeed.

It is a well-established principle of administrative law that anything that restricts, or appears to restrict, the defendant's ability to present his case may be held to be a breach of procedural fairness and, thereby, susceptible to judicial review; for example, a defendant is generally entitled to notice of evidence that might assist his case. It is, therefore, a breach of natural justice for the prosecution to conceal such evidence: *R* v *Leyland Justices, ex p Hawthorn*.[16]

Both before the commencement of the proceedings before the disciplinary authority and at those proceedings, the applicants had, through their solicitors, asked for all relevant information and documents in the possession of the disciplinary authority on the ground that without such material it would be difficult to put up an adequate defence but they were told that only copies of such documents as the board deemed fit would be supplied at the hearing but that some documents before the board were confidential and could not be supplied though the board would act in accordance with the rules of natural justice.

In particular, the applicants' solicitors by a letter dated 29 October 1985, asked for details as to:

(1) when the decision was made to take disciplinary proceedings;
(2) who took that decision; and
(3) if the decision was taken by the disciplinary authority, who were its members.

Furthermore, the applicants' solicitors asked for:

(1) minutes of the meeting at which the decision was made to take disciplinary proceedings;
(2) copies of any documents or reports that had been received by the disciplinary authority;
(3) copies of statements of witnesses to be called and
(4) fuller particulars of the charges against the applicants.

The applicants' solicitors went on to state in their letter that they could not make satisfactory representation whether oral or in writing without copies of the documents or the information or the clarification requested.

The question which now arises for decision regarding this part of the case is whether the effect of the refusal of the disciplinary authority to accede to the requests of the applicants' solicitors and counsel for, what I shall, for the sake of brevity and convenience refer to as 'pre-trial discovery', was tantamount to denying the applicants their right to make written representations guaranteed to them under r 27(4)(e) of the said Rules which provide:

> Where the staff member accepts the opportunity to appear in person before the disciplinary authority –
>
> (a) he may make, either orally or in writing or both orally and in writing, such representation as may in the opinion of the disciplinary authority be relevant to the alleged breach of discipline:
>
> Provided that where any representations are to be made in writing, the same shall be forwarded to the disciplinary authority not less than ten days before the aforesaid date of appearance before the disciplinary authority.

In my view, a reading of the above provisions makes it clear that in order that an applicant might be in a position to submit written representations ten days before the date of appearance before the disciplinary authority, he must be in possession of copies of all relevant documents and information relating to the charges brought against him a reasonable time before such date.

I am fortified in my view, and I derive analogical support from r 26(7) of the Public Officers (Conduct and Discipline) General Orders 1980 (Chapter D), which, although it applies only to members of the public service as defined in art 132 of the Constitution so that lecturers of the respondent university are outside its scope, provides:

> If witnesses are examined by the committee, the officer shall be given an opportunity to be present and to question the witnesses on his own behalf and *no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto.* (emphasis added)

In my opinion, r 26(7) of Chapter D has a common law content so that reliance can be placed upon its provisions by the applicants in support of their right to claim pre-trial discovery.

Now, it is right to say, at the risk of being trite, that the right to be heard necessarily means the right to know the case against oneself. It is not difficult to cite an anthology of cases for this proposition. I need no more than refer to the following.

The headnote to the case of *R* v *General Medical Council, ex p Gee*[17] reads:

> The applicant was entitled to the particulars of improper prescribing of drugs which he had requested, since he was entitled to know in advance the standard against which he was judged. The judge had been right therefore to order the council to supply those further particulars and the appeal on that issue would be dismissed.

The headnote to the case of *R* v *Architects' Registration Tribunal, ex p Jaggar*[18] reads:

> It was improper for the tribunal, which acted in a quasi-judicial capacity, to consider and give weight to evidence contained in documents the contents and source of which were not divulged to the applicant. It was not sufficient that the applicant was merely to explain certain information con-

tained in such documents. Since the applicant was, therefore, not given a real and effective opportunity of meeting relevant allegations made against them, the motion to quash the decision of the tribunal must succeed.

In *Ex p Jaggar*,[18] Lewis J said this at p 139, para 1:

> The tribunal had before them, and used, documents which should have been disclosed, or documents which the applicant was entitled to see if they were going to be used by the tribunal. I wish to make it perfectly clear that I am not for one moment suggesting that any of the three members of this tribunal acted in any improper manner in the sense that they did not act bona fide. But they did not, in my view, do what the authorities say they should have done, which was to give a real and effective opportunity to the litigant to deal with, or meet, any relevant allegations made in these documents. Sir Richard Allison and Mr Crocker have each sworn an affidavit, which I need hardly say I entirely accept. But when one looks at those affidavits, especially at the affidavit of Mr Crocker, one finds that he does not say that a fair opportunity was given to the applicant, Mr Jaggar to meet the allegations. The letters referred to were used as material upon which to base 'pertinent questions'. Mr Jaggar was in entire ignorance – indeed, the contrary is not suggested of the fact that the tribunal had before them two letters at least which had been sent by some third party to the admission committee. Whether stating to an applicant: 'We have certain information, A,B,C and D, will you deal with it?' is giving a litigant a real and effective opportunity of dealing with the matter when the litigant is not told who the informant is, I do not decide. I am extremely doubtful whether anything short of telling the litigant what the information is and what source it came from would be giving him a real and effective opportunity of dealing with it. When that is not done, as it was not done in this case, and the tribunal has before it correspondence of this nature which is not disclosed, and the tribunal looks at that correspondence and base what they call relevant questions upon that correspondence, it seems to me, as I view it, that that is not doing what this tribunal in its position should have done, namely, if they looked at the letters at all, to inform the litigant what they contained and the source from which they came. I wish to repeat that no suggestion is made as to the integrity or bona fides of any members of the tribunal, or of Mr Wicks, or anybody else.

In *Crompton* v *GMC*,[19] a decision of the Privy Council, it was held, in the circumstances of that case, that by refusing to allow the doctor to see the psychiatrist's reports or to inform him of their contents, the committee had failed to observe the rules of natural justice.

In *Crompton* v *GMC (No 2)*[20] at p 895, Lord Brightman speaking for the Privy Council, said:

> ... it is clearly desirable that the mental condition which triggers s 37 of the Medical Act 1983 should be notified to the practitioner with as much particularity as is reasonable and practical, so that he knows what case he has to meet.

In *BSS Kanda* v *Government of the Federation of Malaya*,[21] Lord Denning speaking for the Privy Council said:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn LC in *Board of Education* v *Rice* down to the decision of their Lordships' Board in *Ceylon University* v *Fernando*. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough ... Applying these principles their Lordships are of the opinion that Inspector Kanda was not in this case given a reasonable opportunity of being heard. They find themselves in agreement with the view expressed by Rigby J in these words:
>
> 'In my view, the furnishing of a copy of the findings of the board of inquiry to the adjudicating officer appointed to hear the disciplinary charges, coupled with the fact that no such copy was furnished to the plaintiff, amounted to such a denial of natural justice as to entitle this court to set aside those proceedings on this ground. It amounted, in my view, to a failure to afford the plaintiff a reasonable opportunity of being heard in answer to the charge preferred against him which resulted in his dismissal.'
>
> The mistake of the police authorities was no doubt made entirely in good faith. It was quite proper to let the adjudicating officer have the statements of the witnesses. The Regulations show that it is necessary for him to have them. He will then read those out in the presence of the accused. But their Lordships do not think it was correct to let him have the report of the board of inquiry unless the accused also had it so as to be able to correct or contradict the statements in it to his prejudice.

Turning to the particular circumstances of the present case, so far as the applicant Hashim is concerned, my attention was drawn by his counsel to the fact that nowhere in the complaint by Mr Ogle was any reference made to any report of alleged offences involving students. 'How then,' asked counsel, 'did the disciplinary committee become aware of such alleged offences?'

Having regard to the provisions as to the disciplinary procedure, in particular, rr 25 and 27 of the said Rules, it is clear that it is the disciplinary authority itself that makes a preliminary investigation as to whether the breach of discipline complained of merits the prescribed punishment and, if so satisfied, conducts a formal hearing. Those Rules therefore envisage that the disciplinary authority must be already in possession of all relevant documents *before* the hearing and it can be reasonably presumed that in the present case that was so. Indeed, no attempt was made to suggest the contrary by counsel for the respondent university.

I should add, lest I be accused of an oversight, that I have considered the authorities cited by counsel for the respondent university in support of his contention that the denial of pre-trial discovery in this case did not

amount to a breach of the rules of natural justice. I now propose to refer to those authorities and shall attempt to demonstrate why they are distinguishable.

In *Wiseman* v *Borneman*,[22] the registrar of a tribunal appointed under the Finance Act 1960 had refused the taxpayer's request to be given copies of the Inland Revenue's certificate and counter-statement, whereupon the taxpayer commenced proceedings for a declaration as to whether the tribunal was bound to accede to his request. The House of Lords ruled against the taxpayer. The following extracts from the judgment of their Lordships will make it self-evident why the case is distinguishable from the present case.

At p 308C, Lord Reid said:

> In the great majority of cases which came before this tribunal all the relevant facts are known to the taxpayer and he has a full opportunity to set out in his statutory declaration all the facts which he thinks are relevant and also all arguments on which he relies. The only advantage to him of having a right to see and reply to the counter-statement of the commissioners would then be that he could reply to their arguments. If the tribunal were entitled to pronounce a final judgment against the taxpayer, justice would certainly require that he should have a right to see and reply to this statement, but all the tribunal can do is to find that there is a prima facie case against him.

At p 313G, Lord Donovan said this:

> The commissioners replied that they would send a copy if the tribunal found that there was a prima facie case for proceeding.

And at p 315G, his Lordship continued:

> Moreover, any unfairness to the taxpayer in his not seeing the counter-statement before it is considered by the tribunal is, in my view, more apparent than real. In view of the complexity of fiscal legislation, transactions which have a tax advantage in view, whether as a main object or not, have to be planned with considerable care and usually with professional assistance. It is well known to the taxpayer or his advisers what has to be done and when; and if other persons are to play a part, just what they have to do and when; and what tax advantage is expected to accrue, and when. The taxpayer or his adviser will also have a fairly shrewd idea where any weakness of the scheme lies in relation to s 28, and, therefore, to what points any eventual counter-statement of the commissioners is likely to be directed. Accordingly, while it is possible that that counter-statement may introduce new facts outside the taxpayer's knowledge, the cases where this would happen are likely to be much more the exception than the rule.

In *Paul Wallis Furnell* v *Whangarei High Schools Board*,[23] a complaint had been made against the appellant, a teacher, to his school board, the respondent, which then suspended the appellant pending determination by the teachers' disciplinary board. The teacher had not been heard by the school board. He therefore applied for prohibition to prevent the teachers' disciplinary board from hearing the charges and for certiorari to quash the respondent's decision.

Furnell's case[23] is, therefore, readily distinguishable because there the board that suspended the teacher pending the hearing was not the body that would make the decision, that being left to the teachers' disciplinary board, whereas here the disciplinary authority conducted both the preliminary investigation and the final hearing.

The following extracts from the judgments of some of their Lordships in *Furnell's* case[23] will make the distinction clear.

Headnote (1) to the case reads: That one of the principles of natural justice was that a man should not be condemned unheard, but the sub-committee neither condemned nor criticized.

And Lord Morris at p 673E said this:

> The contrast is very marked between the preliminary investigation of a complaint and the investigation of a charge for the purposes of a hearing and determination.

And at p 679G his Lordship added:

> Natural justice is but fairness writ large and juridically. It has been described as fairplay in action.

Another case relied on by counsel for the respondent university on this point was *Lewis* v *Heffer*[24] where the facts were that there had been faction fighting within the ranks of the Labour Party in Newham north-east constituency resulting in utter chaos. The Party's National Executive Committee considered that the matter was serious enough to call for an inquiry and suspended the officers concerned pending the inquiry. The officers were not heard and commenced proceedings challenging their suspensions.

It was held that there had been no breach of the rules of natural justice.

Geoffrey Lane LJ said this at p 368h:

> It is impossible for the NEC at that stage, and I emphasize those words 'at that stage', to hear both sides. In most types of investigation there is in the early stages a point at which action of some sort must be taken and must be taken firmly in order to set the wheels of investigation in motion. Natural justice will seldom if ever at that stage demand that the investigator should act judicially in the sense of having to hear both sides. No one's livelihood or reputation at that stage is in danger. But the further the proceedings go and the nearer they get to the imposition of a penal sanction or to damaging someone's reputation or to inflicting financial loss on someone, the more necessary it becomes to act judicially, and the greater the importance of observing the maxim, audi alteram partem.

The facts in *Lewis* v *Heffer*[24] are therefore poles apart from the facts in the present case where the disciplinary authority, having decided to take disciplinary action, then proceeds to consider whether the alleged disciplin-

ary breach merits punishment of dismissal or some lesser punishment: r 25 of the said Rules.

Procedural unfairness at the hearing

I must next turn to consider another ground relied upon by the applicants as showing a lack of fairness on the part of the disciplinary authority and this it was said was reflected in the procedure it adopted in the examination of certain student witnesses whose testimony was most material to charges 3, 4 and 5 which the applicant Hashim faced.

It was accepted that whilst the disciplinary authority was not bound to observe strictly the procedure which applied to courts of law, nevertheless this did not mean that it had carte blanche to follow any procedure it chose. That this must be so is I think dictated by the principle that the disciplinary authority had to act with fairness.

A copy of the record of proceedings before the disciplinary authority provided to this court, showed that over the objections of counsel for the applicants, members of the disciplinary authority persisted in telling the student witnesses before they testified what evidence was expected of them.

Counsel for the applicants had pointed out to the disciplinary authority in the course of his objection that as there was going to be an acute conflict of evidence between the testimony which the applicant Hashim would be giving and that which the students would need to say if the charges concerned were to be established, it was vital that the testimony elicited from these students should be unaided.

It was argued for the respondent university that the procedure adopted could be justified because no prosecuting officer appeared before the disciplinary authority and also that the disciplinary authority did not have the advantage of legal advice. With respect, I do not consider that there is substance in either of these arguments.

The fact that no prosecuting officer appeared before the disciplinary authority does not afford an excuse for examining these witnesses in the manner aforesaid bearing in mind that it was essential for it to observe the principle of fairness. Similarly, the point about the disciplinary authority not having had the advantage of legal advice, will not avail the respondent university bearing in mind that the state legal adviser was a member of the panel which constituted the disciplinary authority.

The result therefore was that to a hypothetical impartial observer present at the proceedings before the disciplinary authority, the procedure it adopted, in insisting on telling the student witnesses what evidence they should give notwithstanding the strong objections of counsel for the applicants, it would have seemed that justice was not being done. In this context appearance is as important as reality.

So, for example, in *R* v *Weston-super-Mare Justice, ex p Taylor*,[25] one of the justices closed her eyes and looked down, giving the defendant's solicitor the impression that she was unwell. On an application for judicial review, it was held that she ought to have withdrawn and the decision was quashed.

It follows, therefore, that the applicants have established a breach of the principle enunciated by Hewart CJ in *R* v *Sussex Justices, ex p McCarthy*:[26]

> ... it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

Accordingly, on this ground also the applicants are entitled to succeed.

Duty to give reasons

I must next consider another objection taken by the applicants. It was submitted that the law has developed to a stage where there is a general duty to provide reasons even when the relevant authority acts in a quasi-judicial matter. In support, the following passage in the judgment of Bhagwati J (as he then was) in *Siemens Engineering & Manufacturing Co* v *Union of India*[27] was cited:

> It is now settled law that where an authority makes an order in exercise of a quasi-judicial function, it must record its reasons in support of the order it makes. Every quasi-judicial order must be supported by reasons.
>
> The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process ...

With great respect to Bhagwati J, I consider that if the requirement for reasons is essential for *every* quasi judicial order, then it would place administrative bodies in a very difficult position.

But, having said that, I accept that there are certain cases where reasons for decision should be given particularly when there is a right of appeal, since an appeal is merely a continuation of proceedings by way of rehearing and litigants as well as the appellate tribunal are entitled to know the reasons for the finding.

In *Breen* v *Amalgamated Engineering Union*,[28] Lord Denning MR observed that where a person 'has some right or interest, or some legitimate expectation, of which it would not be fair to deprive him without a hearing or reasons given, then these should be afforded him, according as the case may demand'.

Though Lord Denning gave a minority judgment in that case the majority did not disagree with him on that point.

In the present case, it was argued, and I agree, that in a university environment, the exercise of reason and intellect are encouraged. The applicants are academics and should be told of the scope of free speech and interaction with students and why their defences were rejected. The giving of reasons for decision in a situation such as this would also serve as a guide to other academics in the position of the applicants. Moreover, the applicants' livelihood was at stake. As was well put by Lord Denning in *Breen's* case,[28] at p 191:

> If a man seeks a privilege to which he has no particular claim – such as an appointment to some post or other – then he can be turned away without a word. He need not be heard. No explanation need be given: see the cases cited in *Schmidt* v *Secretary of State for Home Affairs* [1969] 2 Ch 149. But if he is a man whose property is at stake, or who is being deprived of his livelihood, then reasons should be given why he is being turned down, and he should be given a chance to be heard.

In certain circumstances, which I have endeavoured to indicate, a reasoned decision can be an additional constituent of the concept of fairness. I am satisfied that having regard to all the circumstances the present case was such a case. The applicants are also entitled to succeed on this ground since neither the disciplinary authority nor the university council gave any reasons for their decision.

The ultra vires point

I now come to the last of the grounds urged upon me which affects only the applicant Hashim which I find necessary to deal with.

It was argued on his behalf that the council in substituting the penalty of reduction in salary by five salary increments for a period of five years, had exceeded the powers conferred upon it by the said Rules.

In order to appreciate this submission it is necessary to reproduce the relevant provisions in the said Rules relating to penalties which may be imposed by the disciplinary authority; they are as follows:

> 33 The disciplinary authority may impose on a staff member any one, or any appropriate combination of two or more, of the following punishments:
> (a) warning;
> (b) fine;
> (c) forfeiture of salary;
> (d) reduction of salary;
> (e) reduction in rank;
> (f) dismissal.
>
> 35(1) Where the disciplinary authority imposes the punishment of reduction of salary, it may reduce the salary of the staff member to such point in the salary scale of *his grade* and for such period as it deems fit.
> (emphasis added)

I must next reproduce the relevant provisions in the Universities and University Colleges Act 1971, relating to the powers of the council when hearing appeals from any decision of the disciplinary authority; they are as follows:

> 16A(5) Any member of the staff, officer or employee of the university who is dissatisfied with the decision of the disciplinary committee or of any person or board delegated with functions, powers or duties under subsection (3) may appeal against such decision to the university council which may give such decision as it deems fit and proper.

Two things are clear from a reading of the above provisions; firstly, the power conferred upon the disciplinary authority to impose upon a staff member the punishment of reduction in salary, is limited 'to such point in the salary scale of *his grade*', and secondly, no express power is conferred upon the council to increase any of the punishments imposed by the disciplinary authority.

In these circumstances, can the power to increase punishment be implied in favour of the council by reason of the general words 'may give such decision as it deems fit and proper' appearing in s 16A(5)? I think not.

Section 16A(5) is confined to appeals by a staff member only and, indeed, there is no provision for appeals by the disciplinary authority. It follows, therefore, that the power conferred upon the council 'to give such decision as it deems fit and proper' must be construed as empowering the council if it considers that there is no sufficient ground for interfering to dismiss the appeal by the staff member and confirm the punishment imposed by the disciplinary authority or if it considers that there is sufficient ground for interfering, to allow such appeal and reverse the finding and punishment by entering an order of acquittal or to alter the finding, maintaining the punishment with or without altering the finding to reduce the punishment. It goes without saying, therefore, that in no circumstances may the council enhance a punishment imposed by the disciplinary authority since such a power, which must be a creature of statute, is not given to the council. Certainly, neither the disciplinary authority nor the council were empowered to impose the punishment of reduction in salary in excess of the limitation imposed by r 35 of the said Rules.

I regret, therefore, that I am unable to agree with the decision of Wan Hamzah J (as he then was) in *Norliah bte Shukri* v *University of Malaya & Anor*[29] wherein he held that there was nothing in s 16B(5) of the Universities and University Colleges Act 1971 to prevent the minister concerned from enhancing punishment having regard to the words 'may give such decision on the appeal as he deems fit'.

With respect to the learned judge, the question was *not* whether there was anything in the provisions of the statute *to prevent* the minister from enhancing punishment but rather whether there was anything therein *empowering* him to do so.

Now, those being my views, as regards the powers of the council on appeal, how do they affect the applicant Hashim?

They affect him in this way: it was common ground that when the council substituted the punishment of a reduction of salary by five salary increments for five years, this had the effect of reducing him in the salary scale from salary grade A10 to grade A11. But, as has been emphasized, r 35(1) of the said Rules expressly limits the power conferred upon the disciplinary authority to reduce the salary of a staff member 'to such point in the salary scale of his grade'. This limitation must, of course, also apply to the council.

Accordingly, in imposing the substituted punishment of reduction in salary which it did in fact impose the council had acted ultra vires the powers conferred upon it and therefore without jurisdiction.

In all the circumstances, certiorari must go in terms of both applications and with costs.

I am now prepared to hear arguments as to any consequential orders I should make.

Applications allowed.

Solicitors: *Zain & Co.*

Reported by *Prof Ahmad Ibrahim*

Kien Tat Sdn Bhd v Klockner Industrie-Anlagen GmbH

HIGH COURT (KUALA LUMPUR) – CODE NO D1-23-1920-87
GUNN CHIT TUAN J
16 JANUARY 1989

Arbitration – Stay of civil suit proceedings pursuant to arbitration clause in main contract – Application for – Agreement in addendum to main contract to transfer $3m to defendant's account – Dispute regarding transfer – Whether transfer was a loan or a form of security for due performance of plaintiff's obligations – Whether dispute was an independent issue or a dispute arising out of main contract – Provision in main contract to refer disputes and controversies to arbitration – Arbitration Act 1952, s 6

The Malaysian branch of the defendant applied for an order that all further proceedings in the civil suit action by the plaintiff against it be stayed pursuant to s 6 of the Arbitration Act 1952 in that the parties have in a contract dated 25 May 1985 expressly agreed to refer to arbitration any dispute or controversy arising out of the contract. It was the defendant's contention that the plaintiff's claim related to that contract and that the dispute was within the purview of that contract. The defendant also submitted that the parties had entered into a supplementary agreement known as addendum I wherein it was mutually agreed that a sum of $3m would be transferred to the defendant as a form of security for the due performance of the plaintiff's obligations under the contract, but not as a loan as pleaded by the plaintiff.

Held, allowing the defendant's application:

(1) The claim of the plaintiff in this case is really disputed and therefore gives rise to a 'dispute' calling the arbitration clause into operation.

(2) The said addendum I, which forms part of the contract of 25 May 1985, must be read together with it. The reason for the transfer of the $3,000,000 referred to in the said addendum I is not therefore an independent issue. The dispute or controversy regarding the transfer of the $3,000,000 in accordance with a clause in the said addendum I is therefore a dispute or claim which arose out of or was related to the contract as envisaged in its art 37. It is a dispute 'in respect of a matter agreed to be referred to arbitration' within s 6 of the Arbitration Act 1952.

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 539 of 1988.]

Cases referred to

1 *Ellerine Brothers (Pty) Ltd & Anor* v *Klinger* [1982] 1 WLR 1375 (refd)
2 *Associated Bulk Carriers Ltd* v *Koch Shipping Inc (The 'Fuohsan Maru')* [1978] 1 Lloyd's Rep 24 (refd)
3 *Ellis Mechanical Services Ltd* v *Wates Construction Ltd* [1978] 1 Lloyd's Rep 33 (distd)
4 *KSM Insuran Bhd* v *Ong Ah Bah & Anor* [1986] 1 MLJ 237 (distd)
5 *London & North Western Railway* v *Jones* [1915] 2 KB 35 (refd)

Legislation referred to

Arbitration Act 1952 s 6

Datuk Dominic Puthucheary (*Chia Loong Thye* with him) for the plaintiff/respondent.
C Abraham (*J Ding* with him) for the defendant/appellant.

Cur Adv Vult

Gunn Chit Tuan J: The Malaysian branch of Klockner Industrie-Anlagen GmbH (the defendant) applied by way of summons-in-chambers dated 21 July 1987 for an order that all further proceedings in the action known as Civil Suit D1-23-1920-87 by Kien Tat Sdn Bhd (the plaintiff) against it be stayed pursuant to s 6 of the Arbitration Act 1952, in that the parties have an agreement in writting dated 25 May 1985 and have expressly agreed to refer to arbitration the matters in respect of which the action was brought.

In an affidavit dated 17 July 1987 affirmed by one KA Benckendorff, the regional director of the defendant, it was stated that the plaintiff's statement of claim related to a contract which was entered into between the parties and that there are now disputes within the purview of the contract. Reference was made to the following art 37 of the said contract between the parties dated 25 May 1985 wherein it was the intention of the parties to refer any